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IN THE

Supreme Court of the United States

October Term, 1968

No. 1104

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,

Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,

Respondents.

BRIEF FOR PETITIONER

CITATIONS TO OPINION BELOW

The District Court did not write an opinion. Although the trial court did render a Pretrial Order, Amendment to Pretrial Order and Judgment, these are not reported. App. 107a-120a.* The opinion of the Court of Appeals

* A joint appendix containing all the pleadings and orders of the court has been prepared in accordance with Rule 36 for use in Nos. 976 and 1104 and references to that appendix will be cited as App. ---a. Included as part of this brief as appendix material are the pertinent treaties, patent, and other miscellaneous documents. These will be cited, for example, as App. A at ---.

for the Tenth Circuit, affirming the judgment of the lower court, was entered October 31, 1968. The case is reported at 402 F. 2d 739. App. 131a-146a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

The United States Court of Appeals for the Tenth Circuit has decided that when the State of Oklahoma entered the Union in 1907, under the so-called implied trust-equal footing doctrine, the state by operation of law obtained title to the river bed underlying the navigable portion of the Arkansas River. The questions presented are:

1. Did the United States Government in 1838 impliedly reserve in trust for a future state, title to the bed of the navigable portion of the Arkansas River, under the mandate of the so-called "equal footing" doctrine when, without reservation, fee simple title to the vast area containing the river was conveyed by patent executed pursuant to valid treaty between the United States and the Cherokee Nation, as one undivided tract, the perimeters of which were described by metes and bounds, and when, the treaties with the Cherokee Nation defining the property expressly prohibited the ceded property from being included within the territorial limits or jurisdiction of any state or territory?

2. Did the Court of Appeals misconstrue and misapply the teaching of this Court in *United States v. Holt State Bank*, 270 U.S. 49, with regard to the implied trust-equal footing doctrine, in that the determination of intent to convey title to land under navigable waters can only be made after the Court has considered not only

the words of the treaty and patent but also considered the nature of the Indian title, the circumstances in which the documents were prepared, the object sought to be attained, and the prior habits and customs and needs of the tribe?

STATUTES AND TREATIES INVOLVED

The case requires an examination of three principal treaties with the Cherokee Nation.

1. The Cherokee Treaty at Washington, D. C. with the Western (Old Settler) Cherokees dated May 6, 1828 [7 Stat. 311], proclaimed May 28, 1828;

2. The Cherokee Treaty at Fort Gibson with the Western (Old Settler) Cherokees dated February 14, 1833 [7 Stat. 414], proclaimed April 12, 1834;

3. The Cherokee Treaty at New Echota, Georgia, with the Cherokee Nation dated December 29, 1835 [7 Stat. 478], proclaimed May 23, 1836;

4. Patent executed by President Martin Van Buren, dated December 31, 1838.

See Appendices A, B, C, and D, *infra.*

STATEMENT OF THE CASE

1. Proceedings Below

In December, 1966, the Cherokee Nation filed an action in the United States District Court for the Eastern District of Oklahoma against the State of Oklahoma, the Commissioners of the Land Offices of the State of Oklahoma, and the holders of various mineral leases which, in general terms, sought to (1) recover from the

State of Oklahoma and the Commissioners of the Land Office judgment for all monies heretofore by them collected, and (2) compel the State and Commissioners of the Land Office to pay to the United States, for the use of the Cherokee Nation, all monies derived from bonuses, rentals, and royalties from said leases which the defendants now hold and (3) obtain judgment against the said corporate and other defendants requiring them to pay all future royalties derived from their respective leases to the United States of America as Trustee for the tribe, and (4) restrain each and every defendant from interfering in any manner or form with the rights of the tribe, to the land underlying the bed of the Arkansas River from the point of confluence of the Grand River (sometimes known as the Neosho River and the Neosho Grand River) to the confluence of the Canadian River and the northerly half of the river bed from that point to the Oklahoma-Arkansas border. App. 12a-14a. The Cherokee Nation asserted that the land in question had been granted to the tribe by the United States pursuant to the treaties of 1828, 1833, and 1835 and the patent of 1838 whereby the Cherokee Nation obtained fee simple title to the entire area described, without reservation or exception. The Cherokee Nation asserted title to the entire portion of the river bed above the confluence of the Canadian and north half of the river "along the center of its main channel to the state line of Arkansas." App. 7a.

The various lease holders who held the property pursuant to leases from the state filed answers. Many of the lease holders filed cross-claims against the state and counterclaims against the tribe. On February 1, 1967, the State of Oklahoma filed its answer and counterclaimed to quiet title asserting that the river was navigable and that the property beneath the Arkansas River below the high water mark passed by operation of law to the state when it entered the Union.

The Choctaw and Chickasaw Nations (referred to as the Choctaws hereinafter) intervened as plaintiffs in the action claiming title to a portion of the riverbed in question on the basis of the Choctaw Treaty of Doak's Stand, October 18, 1820 [7 Stat. 210] and Choctaw Treaty of Dancing Rabbit Creek, September 27, 1830, [7 Stat. 333, Art. III]. The Choctaws and Chickasaws asserted that the United States ceded a portion of the natural bed of the Arkansas River below the high water mark to the tribes from the confluence of the Arkansas River with the Canadian River thence to the eastern boundary of the State of Oklahoma[1] when the Government established the Northern Boundary of the tribal lands. App. 106a.

The trial court on September 25, 1967, entered a Pretrial Order setting forth the issues in the case and rendering its decision. It was stipulated by all parties that the Arkansas River in the area in question was navigable; and the Court on November 15, 1967, entered its order quieting title in the state. The Court stated that the state became "by operation of law the owner of the lands comprising the bed of the Arkansas River between the high water banks from its confluence with the Grand River to the eastern boundary of Oklahoma, . . ." App. 119a.

On appeal the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court and rendered its decision asserting that the land in question passed to the State of Oklahoma upon its admission to the Union on the basis of the equal

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[1] It is this portion of the river between the Cherokee Nation and Choctaw-Chickasaw Nations which is in dispute. The Court of Appeals found it unnecessary to consider the jurisdiction of the Court over the claim of the Choctaws against the Cherokees or the validity of that claim. App. 146a.

footing-implied trust doctrine. 131a-146a. The Cherokee Nation filed its petition for certiorari on March 3, 1969, and the Court granted the petition on April 21, 1969.

2. Facts

The basis of the present claim lies in the interpretation to be placed upon the original treaties and patent establishing the Cherokee Nation in what was then Indian Territory and which is now the State of Oklahoma. The Cherokee Nation at the time of the founding of this nation owned vast tracts of land East of the Mississippi, in present day southern Virginia, Georgia, South Carolina, western North Carolina, eastern Tennessee and northeastern Alabama.[2] The Cherokee Nation either voluntarily or by force of arms was required to exchange these lands and to abandon its homeland in the east and forced to move to the far western lands of the Indian Territory.

In 1785, the tribe concluded the Treaty of Hopewell with the newly established American Nation, whereby the tribe brought itself under the protection of the United States and whereby each party agreed to respect the integrity and sovereignty of the other. The principles announced in this treaty were reasserted and reaffirmed in all subsequent treaties. Under these treaties the Cherokee Nation was guaranteed its own laws and form of government, and complete dominion and control over all the land and rivers within its domain. See *Cherokee Nation v. State of Georgia,* 30 U.S. [5 Pet.] 1, 18; and *Worcester v. State of Georgia,* 31 U.S. [6 Pet.] 515, 556.

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[2] Conservative estimates figure the total amount of acreage to be 79,986,454. Charles C. Royce, The Cherokee Nation of Indians, Fifth Annual Report of Bureau of Ethnology, Smithsonian Institute, Washington, D.C. (1883-1884, Page 378)

After the Revolutionary War white settlers moved westward and southward trespassing upon Cherokee lands and coming in contact and conflict with the Cherokees. The frontier states such as Georgia wanted the Cherokee land for their people. Consequently, these states, especially Georgia, passed laws over the Cherokee domain, thus encroaching upon and taking away tribal lands. The Cherokee Nation took the matters to Court. In *Worcester v. State of Georgia*, 31 U.S. [6 Pet.] 515, 556, Mr. Chief Justice Marshall affirmed sovereignty of the Cherokee Nation over its domain and the plenary power of Congress to deal with the Indians which power could not be abridged by the states. Nonetheless, the contact and conflict between the settlers and the Indians did not abate. The Cherokees were placed in a situation where they had little or no recourse; either move, fight, or be overrun.

In 1817 and 1819, a few members of Cherokee Nation had been induced to give up their tribal lands in the East and move westward into Arkansas. [7 Stat. 156, 195]. These Cherokees thereinafter became known as the western or "Old Settler" Cherokees.

Then in 1828, "the present location in Arkansas being unfavorable to their present repose"; Congress wanted to move the Cherokee further west, with the stated purpose of establishing:

> * * * *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; * * *. [Emphasis in original.] App. A, *infra.*

The Old Settler Cherokees, with this promise, moved further westward beyond Arkansas and Missouri [7 Stat. 311]. Article 2 of the treaty set out by metes and bounds the precise area which would form the permanent home and future domain of the Cherokee Nation.[3] See App. A, *infra.*

The major portion of the tribe still remained in the east. In 1830 after the passage of the Indian Removal Bill [4 Stat. 411], the Government pursued a more aggressive policy of trying to move the eastern Cherokee Nation westward into the lands across the Mississippi.[4]

In 1833 the United States eliminated a conflict between the Creeks and Cherokees over the boundaries of this tribal land. By treaty [7 Stat. 414] the government corrected and fixed the respective boundaries in the subject area thus completing the isolation of these tribes. See App. B, *infra.* Pursuant to the Treaty of New Echota December 29, 1835 [7 Stat. 478], the main body of the Cherokee Nation still remaining in Georgia was moved in 1838-1839 to the new lands west of Arkansas in order to

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[3] While the treaty on its face appears to be with the Old Settler Cherokees, it is equally clear that the United States contemplated and intended this area in Indian Territory to be the home for the entire tribe, western and eastern Cherokee.

[4] In 1803 the United States acquired from France sovereign title to lands west of the Mississippi. It thereafter acquired aboriginal Indian title from the native Osages in 1825. Thereafter it began its policy of removal and isolation, whereby Indian tribes were transferred from areas inhabited by white settlers and resettled and given land separate and apart from the white man where the Indians could carry on their way of life undisturbed. In 1893 this policy was changed.

remove the last vestige of friction between the Cherokees and the settlements in Georgia.[5]

As a practical matter, after 1833 the Cherokee Nation was the treaty owner of some 7,000,000 acres of land in what is now eastern Oklahoma, including the Cherokee portion of the river bed in question, over which it exercised complete use, dominion, and control. The Treaty of 1833 as well as the Treaty of New Echota in 1835 provided for the issuance of a patent in fee simple which would confirm and manifest the Cherokee ownership to the land conveyed.

The Treaty of New Echota of 1835, incorporating the granting provisions of the earlier 1828 and 1833 treaties, again set out by metes and bounds the vast tract of land in Indian Territory which was to be the home of the Cherokee Nation. The description in Article 2 encompassed the Arkansas River in the following language:

> Thence down said Verdigris River to the Arkansas River to a point where a stone is placed opposite the east or lower bank of the Grand River at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence in a

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[5] See 27 Ct. Cl. 1 (1891) The *Western Cherokee v. United States*. In this case the Court sets forth with clarity the history of the Cherokee Nation. "The Eastern Cherokees were prisoners in Georgia, under the guard of 5,000 United States troops who had hunted them down from their mountains and driven them out of their valleys and were now bringing them to the terms of an enforced emigration. In 1836, the Government, apprehending collisions with the people of Georgia and weary of being thwarted in the diplomatic field, sent a military force to bring negotiations to an end and effect a forcible removal." *Id.* at 20-21. This case carefully traces the background of the Treaty of New Echota. *Id.* at 23-25.

> straight line to a point four miles northerly, from the mouth of the north fork of the Canadian; *thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas* where this Eastern Choctaw boundary strikes said river and running thence with the western line of Arkansas territory as now defined, . . . (Emphasis added.) App. C, *infra.*

Further, it was expressly stated in Article 5 of the Treaty of New Echota of 1835:

> The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article *shall in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory.* (Emphasis added.) App. C at C-7.

During the period 1831-32 and 1836-1837, surveys of the land in question were conducted by Reverend Isaac McCoy. Subsequently in December 1838, the Cherokee Nation was issued the *first patent* in fee simple to the land ceded by the United States. The patent set out in detail the metes and bounds descriptions and the exact acreage conveyed. The description stated:

> AND WHEREAS, the United States have caused the said tract of Seven Millions of Acres, together with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows: beginning at a mound of rocks four feet square * * on what has been denominated the old western territorial line of Arkansas Territory twenty-five miles north of Arkansas river; thence south twenty-one miles and twenty eight chains, to a a post on the north-east bank of the Verdigris river; * * thence down the Verdigris river, on the northeast bank, with its meanders to

the junction of Verdigiris and Arkansas rivers; thence from the lower bank of Verdigris river on the north Bank of Arkansas river south forty-four degrees, thirteen minutes, east, fifty seven chains, to a post on the south bank of Arkansas opposite the eastern bank of Neosho river at its junction with Arkansas, * * thence south fifty three degrees west, one mile, to a post * * thence south eighteen degrees, eighteen minutes west thirty three miles, twenty-eight chains and eighty links, to a rock * * thence south four miles, to a post, on the lower bank of the north fork of Canadian river, at its junction with Canadian river, * * * *thence down the Canadian river on its north bank to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of Arkansas river, four chains and fifty four links east of Fort Smith;* thence north seven degrees twenty five minutes west with the western boundary of the State of Arkansas, seventy-six miles sixty four chains and fifty links, to the southwest corner of the State of Missouri; thence north, on the western boundary of the State of Missouri eight miles, forty nine chains and fifty links, to the north bank of Cowskin, or Seneca river, at a mound six feet square at base and five feet high * * thence west on the southern boundary of the lands of the Senecas, eleven miles and forty-eight chains, to a post on the east bank of Neosho river; * * thence up Neosho river, with its meanders on the east bank, to the southern boundary of the Osage lands, thirty six chains and fifty links west of the southeast corner of the lands of the Osages, witnessed by a

> mound of rocks on the west bank of the Neosho river; thence west on the southern boundary of the Osage lands to the line dividing the territory of the United States from that of Mexico two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square * * thence south along the line of the territory of the United States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square * * thence east along the northern boundary of Creek lands, two hundred and seventy-three miles, fifty-five chains and sixty six links, to the beginning, containing within the Survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundredths of an acre.– (Emphasis added.) App. D, *infra.*

The grant to the Cherokees in the treaties and patent was absolute and contained no exception or reservation to the land conveyed.

In 1902 the United States executed an agreement with the Cherokee Nation whereby tribal title to certain of its *allottable* land was extinguished and individual grants of allottable land were made to enrolled tribal members. [32 Stat. 716, 727, Act of July 1, 1902]. Fee title to all of the lands which were not so distributed remained vested in the Cherokee Nation under treaty and patent. The title to the bed under the navigable portion of the Arkansas River was never granted to anyone, within or without the tribe. Thereafter in 1907, the twin territories entered the Union pursuant to the Oklahoma Enabling Act [34 Stat. 267][6] upon the condition:

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[6] In the earlier Curtis Act [30 Stat. 495] June 28, 1898, § 11 provided," . . . but all oil, coal, asphalt, and mineral deposits in the

(Cont'd on p. 13)

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said limits owned or held by any Indian or Indian tribes, * * *.

See also Oklahoma Constitution Article I, Section 3.

On the basis of these treaty and patent provisions, the Cherokee Nation asserted its claim for an accounting as fee simple owner of the land in question.

SUMMARY OF ARGUMENT

In the early 1800's the United States Government initiated a series of treaties with the Cherokee Nation culminating in the Treaty of New Echota in 1835. Under the provisions of this treaty the Cherokee Nation ceded to the United States its remaining tribal lands in the East in return for lands across the Mississippi River in Indian Territory, in what is now the State of Oklahoma. For the treaty cessions, the Cherokee Nation was granted lands in the west, evidenced by a patent executed by President Martin Van Buren in 1838. This patent explicitly granted to the Cherokee Nation fee simple title to all the land within the metes and bounds description without exception or reservation. The portion of the Arkansas River in Oklahoma was within the perimeters of the metes and bounds description, so that the title to the riverbed passed to the Cherokee Nation.

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[6] (Cont'd from p. 12)

lands of any tribe are reserved to such tribe, and no allotment of such lands shall carry title to such oil, coal, asphalt, or other mineral deposits; and all town sites shall also be reserved to the several tribes and shall be set apart by the commission heretofore mentioned as incapable of allotment."

In its opinion, the Court of Appeals for the Tenth Circuit asserted that the United States Government had reserved title to the bed under the Arkansas River because it was a navigable river and that such title passed to the State of Oklahoma on the basis of the implied trust-equal footing doctrine articulated in *Pollard v. Hagan*, 44 U.S.[3 How.] 212. The appellate court further stated in its decision that the title to land beneath navigable waters could only have been conveyed to the Cherokee Nation by an express grant or a clear manifestation of intent to convey such land, citing *United States v. Holt State Bank*, 270 U.S. 49.

The claim of the Cherokee Nation is founded upon the express provisions of the treaties and patent involved, interpreted in the context of the special facts and circumstances which existed between the Cherokee Nation and the United States Government. These facts and circumstances manifest a clear intent to establish the Cherokee Nation as the fee simple owner of all the land within the metes and bounds description, including the bed of the river beneath the navigable portion of the Arkansas River. The Cherokee Nation had not aboriginal Indian title of use and occupancy, but fee simple title by patent executed pursuant to treaties adopted and ratified by the United States Senate, and constituting the highest law of the land.

The Court of Appeals has interpreted the implied trust-equal footing doctrine as an absolute requirement, when in the context of this case the doctrine simply is not applicable. The implied trust-equal footing doctrine has been applied in situations where the formation of a state was imminent, and when there had been no prior disposition of the fee simple title to the land. In the case here presented, it is difficult to conceive of an implied trust for a yet-to-be-formed state, when the Congress expressly provided in all the treaties with its Indian ward that *no state* would be formed in such land.

Further the state claims an implied trust against a people under the protection and care of the Government and to whom the Government owed a prior duty of trust.The implied trust-equal footing doctrine relied upon by the court was not even articulated until 1845, seven years after the issuance of the fee simple patent to the Cherokee Nation.

It has long been the rule of interpretation in construing treaties with the Indians that such treaties are to be interpreted liberally in the manner in which the Indians would naturally understand their terms, so as to give full effect to the protection of Indians. In interpreting treaties, this Court has examined the prior habits and condition of the particular Indian tribe, as well as the actual words of the treaty and the circumstances surrounding the treaties, in order to determine the intent of the parties. The Court of Appeals stated that no intent to convey the title to the land underlying the navigable portion of the Arkansas River was manifested. While the appellate court agrees that the Government can convey title to land below the high water in a navigable river, this can be accomplished only by clear and convincing actions. The unique treatment of the Cherokee Nation and the other Five Civilized Tribes clearly discloses such an intent. The issuance of a patent in fee simple and the combination of treaty and patent language demonstrates an intent to establish the Cherokee Nation as sovereign in these new lands subject only to limitations imposed by the Constitution.

The United States Government issued to the Cherokee Nation the first patent conveying fee simple title to an Indian tribe. This conveyance of fee simple title in 1838 refutes an implied reservation of title. When in 1907 Oklahoma entered the Union, the title to the riverbed under the navigable portion of the Arkansas River had not been disposed of, so that title still rests in the Cherokee Nation.

ARGUMENT

1. Title to the Riverbed Did Not Pass to the State of Oklahoma by Operation of Law Upon Its Admission to the Union

The District Court in its judgment determined that by operation law title to the land under the navigable portion of the Arkansas River passed to the State of Oklahoma upon its admission to the Union. (App. 119a). The Court of Appeals in its opinion affirmed this decision asserting that under the "implied trust-equal footing doctrine" articulated in *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230, the Government held title to the riverbed for future states that might be formed, and accordingly, the Cherokee Nation never received title to the land under the Arkansas River. The Court of Appeals rationalized its decision by stating that there was no clear and definite intent to convey the beds of navigable rivers to the tribe, as required by this Court in *United States v. Holt State Bank*, 270 U.S. 49 and no language in the treaties, statutes, or patents demonstrated such a conveyance. Further, if Congress had conveyed title to the riverbed to the Cherokee Nation, Oklahoma would not have been admitted to the Union on an equal footing with the original states; and said the court, "There is no place in our Federal system for a second-class state." App. 140a.

The Court of Appeals failed to grasp the meaning and purpose of the doctrine. The Court held, in effect, that the implied trust-equal footing doctrine is an automatic absolute rule of construction, permitting of no exceptions. See *Shively v. Bowlby*, 152 U.S. 1. This doctrine does not place upon the federal government any restraint upon its power to dispose of land to which it has title, as it deems necessary and proper. A close examination of the *Pollard* case discloses the guiding

principles underlying this constitutional rule of equality. In *Pollard* , Georgia and Virginia ceded property to be held by the United States *in trust upon the condition* that the state of Alabama be formed. Included in the territory so ceded was the Mobile River. The United States, while under this condition, attempted to grant title to the soil under the river on the ground that the United States pursuant to the Constitution had acceded to the sovereign title of the navigable waters. The Court stated that the title to the navigable waters passed to the individual states at the time of the Revolution, and these states held title subject only to the constitutional authority to regulate commerce. The federal government could not make grants of such land contrary to state grants in view of the condition of trust, for to do so would impinge upon the sovereignty, jurisdiction, and right of soil of the state of Alabama. The United States in this case could only carry out the specific trust created by the deeds of cession. Indeed, the territory of Alabama had already been designated and *statehood was imminent*. It must be noted that the land in question under the Mobile River had not been obtained by the United States by treaty from Spain or by conquest or by purchase. Title to the land under the navigable river came from the states. Under such conditions the implied trust-equal footing doctrine is operable.

In a later case also involving land under the Mobile River in Alabama, Mr. Justice Taney in *Goodtitle v. Kibbe,* 50 U.S. [9 Howard] 471, 478 emphasized that had the land in question been otherwise obtained than from the states by deeds of cession, "Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a state. But this was not done." See also *Knight v. United Land Assoc.*, 142 U.S. 161.

The requirement that states be admitted on an equal footing with the original states does not demand that

Courts wipe out economic diversities. In *Alabama v. Texas*, 347 U.S. 272, 275, Mr. Justice Reed plainly stated that the equal footing doctrine "does not affect Congress' power to dispose of federal property." In *Brewer-Elliot Oil & Gas Company v. United States*, 260 U.S. 77, it was stated in dicta that "there was nothing in the admission of Oklahoma into constitutional equality of power with the other states which required or permitted a devesting [sic] of the title [to land]."[7] *Id.* at 88.

The doctrine of equality is directed to the parity of political standing and sovereignty. See *Pollard v. Hagan supra; Coyle v. Smith*, 221 U.S. 559. The doctrine of implied trust-equal footing is not a bridle on the power of the federal government to transfer title to land which it owns.

The sovereign can convey title to lands under navigable waters as it deems necessary and proper. The scope of the power of Congress to transfer title to lands beneath the navigable waters was summed up in *Shively v. Bowlby*, 152 U.S. 1, 48:

> . . .[C]ongress has the power to make grants of land below the high water mark of navigable waters in any territory of the United States whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign Nations and among the several states, or to carry out other public purposes appropriate to the objects of which the United States hold the territory.

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[7] It must be pointed out that this, like so many other cases, turned on a question of navigability, which question has been stipulated in the present case.

Certainly it cannot be denied that the grant of fee simple title to the Cherokee Nation to all the land within the perimeters of the metes and bounds description was for a valid public purpose. Although the Court of Appeals left this question unanswered, the facts underlying the treaty of 1835 and the Indian Removal Bill of 1830 manifest the public purpose to acquire the valuable Cherokee lands in the east for settlement, to obtain title, and to control the rivers within the Indian domain and to avoid further conflict and contact with the Indians.[8]

The Court of Appeals appears to be impressed by the argument that unless title to the land under the navigable portion of the Arkansas River passed to the state upon its admission to the Union, the power of Congress to regulate commerce would somehow be jeopardized or compromised. However, there is nothing in the conveyance of title to the land beneath the navigable waters which conflicts with the power of the Government to hold such lands for navigation. *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946).

As stated, the implied trust-equal footing doctrine in no way impairs the power of Congress to convey title to land beneath navigable waters. "That Congress had power to make the reservation inclusive of the adjacent waters and submerged land, as well as the upland, needs little more than statement. *All were the property of the United States...* over which Congress had complete legislative authority." (Emphasis added.) *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 87. It cannot be truly argued that the federal government, the sovereign, is bound to retain title to land beneath the navigable

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[8] A recognized public purpose is that of safeguarding and advancing a dependent people dwelling within the United States. *United States v. Rickert,* 188 U.S. 432.

waters until such time as a state is formed, whatever period of years that might be.[9]

Indeed, the language of the treaties themselves refutes the application of the implied trust-equal footing doctrine. In the preamble of the Treaty of 1828, it was stated:

> Whereas, it being the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians, as well as those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, or any of the limits of any existing Territory or State; see App. A, *infra.*

A *permanent* home for the Cherokees free from the intrusion of the United States or any territory or state does not comport with a trust relationship for any future state. Again in Article 5 of the Treaty of New Echota in 1835, it was stated:

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[9] In the two cases relied upon by the Court of Appeals, *Pollard v. Hagan,* 44 U.S. [3 How.] 212 and *United States v. Holt State Bank,* 270 U.S. 49, it should be noted, *inter alia,* that statehood for Alabama and Minnesota was imminent. In this case the formation of a new state was not considered or impending at the time of the grant. Oklahoma did not come into existence for almost 75 years after the first grant of land in Indian Territory to the Cherokee Nation.

> ARTICLE 5. The United States hereby convenant and agree that the *lands ceded to the Cherokee nation* in the foregoing article shall, *in no future time* without their consent, *be included within the territorial limits or jurisdiction of any State or Territory.* But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the consitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same. [Emphasis added.]

It is difficult to conceive of an implied trust for a new state or states, when Congress specifically stated that no state would be formed to include the lands of the Cherokee Nation. The manifest intent was to provide a home from which they could not be crowded out.[10] In its opinion the Court of Appeals asserts that the above stated provisions of the treaties related "to the exercise of political power rather than property rights." App. 141a. This statement demonstrates vividly the failure of

[10] The Cherokee Nation was to be completely sovereign with the power to exclude white men from its land. See letter of Isaac McCoy, September 20, 1837, reflecting the contemporaneous appreciation that no state would be formed in Indian lands and the Government would protect the Indians. App. E, *infra.*

the appellate court to grasp the meaning and purpose of the equal footing doctrine. The treaties and patent in question obviously conveyed property. To the Cherokee Nation or any Indian tribe, such property rights would be valueless, if at the same time power over this property could be vested in a state or territory. The treaties guaranteed to the Cherokee Nation quiet and secure title to all the land conveyed and the power to administer the land ceded, the power to govern absolutely within the perimeter of its metes and bounds description. This power was not impinged upon until the Act of 1902 broke down the communal tribal property structure and distributed tribal lands to enrolled members, so that the state of Oklahoma could be formed.

The Cherokee Nation as with other Indian tribes was a dependent sovereign to whom the Government owed a duty of trust. Indeed from its earliest treaty relationship the Government had promised the Cherokee Nation its care and protection. In such a relationship of trust, it is inconceivable that the United States could also serve as trustee for a future state, when such a trust would be adverse and inconsistent with its prior obligation to the Indian tribe. As was said in *United States v. Creek Nation*, 295 U.S. 103, 109, 110.

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of the Government. But this power to control and manage was not absolute. . . .[I]t was subject to the limitation inhering in such a guardianship and to pertinent constitutional restrictions.

To assert the application of the implied trust-equal footing doctrine against the interest of the Cherokee Nation would mean that the Government intended to and did breach its primary fiduciary obligation.

The intent of Congress cannot be extrapolated; it is to be ascertained from the documents, treaties, patents, and letters, the entire situation and needs of the Indian and the object to be attained. One of the foremost objects to be attained in the relocation of the Cherokee Nation was the maintenance of tribal sovereignty. This objective could not be attained if the Government retained title to strips of land running throughout this grant of vast acreage.[11] It is even more difficult to apply to these treaties an implied trust doctrine which was not articulated as a controlling policy consideration until 1845 in *Pollard v. Hagan*, in a situation involving an express trust. To admit that at the time the Government negotiated these treaties, guaranteeing title and protection of tribal sovereignty, Congress was reserving title to the riverbed for a future state, yet-to-be-thought-of, would be to admit that the Congress and the Executive never intended that the United States honor its treaty commitments. As this Court stated in *Menominee Tribe v. United States*, 391 U.S. 404, 412, quoting *Pigeon River Co. v. Cox Ltd.*, 291 U.S. 138, 160, "The intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."

If Congress intended to reserve or retain title to the land beneath the Arkansas River, it should have done so specifically. At no point did the Government reserve or exclude from transfer any portion of the land within the metes and bounds description. The language in the metes and bounds description was clearly stated and that should control. *Lowndes v. Town of Huntington*, 153 U.S. 1.

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[11] The land ceded to the tribes was not surveyed until 1831-1832. At the time of the grant it was not clear how many navigable rivers were contained in the tract. If followed to its logical conclusion, the argument of the State of Oklahoma would hold that the federal government retained title to as yet unknown and uncharted rivers.

The Arkansas River, the subject matter of this suit, has been used as a landmark in all the treaties between the Government and the Cherokee Nation. Compare Article 2, Treaty of 1828, Appendix A; Article I, Treaty of 1833, Appendix B; Article 2, Treaty of 1835, Appendix C. In none of the treaties did the Government reserve or exclude any portion of the land within the metes and bounds description. The description contained in the 1835 Treaty of New Echota brings together the grants contained in the prior treaties:

> ARTICLE 2. Whereas by the treaty of May 6th 1828 and the supplementary treaty thereto of Feb. 14th 1833 with the Cherokees west of the Mississippi the United States guarantied [sic] and secured to be conveyed by patent, to the Cherokee nation of Indians the following tract of country "Beginning at a point on the old western territorial line of Arkansas Territory being twenty-five miles north from the point where the territorial line crosses Arkansas river, thence running from said north point south on the said territorial line where the said territorial line crosses Verdigris river; thence down said Verdigris river *to the Arkansas river; thence down said Arkansas to a point where a stone is* placed opposite the east or lower bank of Grand river at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence in a straight line to a point four miles northerly; from the mouth of the north fork of the Canadian; thence along the said four mile line to the Canadian; *thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river and running thence with the western line of Arkansas Territory as now defined, to the southwest corner of Missouri*;

> thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand river; thence up said Grand river as far as the south line of the Osage reservation, extended if necessary; thence up and between said south Osage line extended west if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend: (Emphasis added.)

This same description was included in the patent of 1838, as follows:

> Thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of the Arkansas river, four chains and fifty-four links East of Ft. Smith.[12]

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[12] The Arkansas River by treaty and patent was established as the boundary between the Cherokee and Choctaw lands. The Cherokee Nation was granted its lands down the main channel of the Arkansas River, although surveys of the Choctaw and Cherokee line began on the South bank of the river. See App. F, letter of March 11, 1886, *infra*, which summarizes the various Cherokee and Choctaw treaties placing the Arkansas River within the Cherokee grant. In any event, it is clear that the Arkansas River was not reserved for some future State.

In the Enabling Act of 1906 [34 Stat. 267], Congress again recognized the integrity of the Cherokee tribal lands when it specifically provided that certain lands would belong to the Indians and the tribes and would not become part of the State of Oklahoma. The then territory of Oklahoma entered the Union upon the condition:

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said limits owned or held by any Indian or Indian * * * *.

In its own constitution (Article I, Section 3) the state incorporated this provision.[13]

Prior to Oklahoma becoming a state in 1907, Congress acting under the recommendations of the Dawes Commission, enacted the Curtis Act (30 Stat. 495, June 28, 1898) and the Act of July 1, 1902, the so-called Cherokee Allotment Agreement and the Act of April 26, 1906. These Acts provided for the allotment of tribal lands to all members of the tribe as shown on the Cherokee citizenship rolls. Under these Acts the Cherokee lands were divided. No disposition was made of the land under the Arkansas River. The existence of the tribe and its government have been perpetuated by successive acts of Congress, concluding with Section 28 of the Act of April 26, 1906 which provided "the tribal existence and the

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[13] It is difficult to square this exclusion of certain lands from state ownership with the Court of Appeals' determination that anything less than complete dominion and control of land within the state would relegate Oklahoma to the status of a second-class state.

present tribal government . . . are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, . . ." 34 Stat. 137, ch. 1876, April 26, 1906; 34 Stat. 822, March 2, 1906, Pub. Res. No. 7. See also Title 25 U.S.C. Section 993(b) (1962).

Accordingly, the land in question is still held by the Cherokee Nation and did not pass to the state by operation of law under implied trust-equal footing doctrine.

2. The United States Government Intended to and Did Convey to the Cherokee Nation Fee Simple Title to the Land within the Metes and Bounds Description of the Treaties and Patent including the Land under the Navigable Portion of the Arkansas River.

A. Nature of the Cherokee Title

In the respondent's brief in opposition to the petition for certiorari, the respondent challenged the nature and scope of the title conveyed by the Government to the Cherokee Nation. It is important to recognize at this point that the title held by the Cherokee Nation and the other Five Civilized Tribes is not the usual aboriginal Indian title held by use and occupancy, but it is a fee simple title acquired by treaty and evidenced by the patent of 1838. See, *e.g. United States v. Creek Nation* 295 U.S. 103. The United States Government granted to the tribe a terminable fee, that is, a grant of fee simple title upon the condition that the lands would revert to the United States only if and when the Cherokee Nation ceased to exist or abandoned the same. See Treaty of 1838, 7 Stat. 478; patent of 1838 paragraphs Art. 2d and Art. 3d; App. C and D, respectively.

The fact that the fee was terminable by an event which still has not occurred, that is, the extinction of the tribe and tribal government[14] did not affect or detract from the quality of the title vested in the Nation. By granting the Cherokee Nation fee simple title, the Government assured the tribe that it would hold its land as the white man did.[15] See *Northwestern Band of Shoshone Indians v. United States*, 324 U.S. 335, 340.

The distinction between two types of title is basic to the understanding of this case. Compare *Shoshone Tribe v. United States*, 299 U.S. 476 with *United States v. Creek Nation*, 295 U.S. 103. As the Court pointed out in the *Creek Nation* case, *supra*, "The Creek Tribe had fee simple title, not the usual Indian right of occupancy with the fee in the United States. That title was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession." Indeed, the patent to the Cherokee Nation was the *first patent* ever issued to an Indian Tribe, and the treaty likewise "guaranteed and secured, to be conveyed by patent, to the Cherokee Nation of Indians the following tract of country . . ." See Article 2, Treaty of 1835, App. C, *infra*. The description which followed included the Arkansas River from its confluence with the Neosho Grand to the Canadian River and from the Canadian to the western border of Arkansas.

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[14] Certainly the tribe did not abandon the land in question. The tribe and tribal members despite the State of Oklahoma's arguments to the contrary have considered the land to belong to the tribe and on this basis sought an accounting.

[15] Commissioner Schermerhorn's address to the Cherokees, July 20, 1835, Senate Ex. Doc 120, Twenty-Fifth Congress, 2d session, pp. 456-457.

The land granted to the Cherokee Nation and the other Five Civilized Tribes was, as mentioned, in the nature of fee simple grants evidenced by patent. Consequently, the need for precision was understood and arrangements were made for surveys and boundary lines using the treaty metes and bounds description. See, for example, Article 3 of the Treaty of 1828. Under the treaties with the Cherokee Nation, the Government had ceded *two* tracts of land, each containing approximately seven million acres. These tracts were to be included in a single patent. Similarly, the Choctaws and Chickasaws had been ceded land to the south of the Cherokee Nation. The claim of the Choctaw and Chickasaw Nations will be set forth in their brief, No. 976. It becomes evident from an examination of the surveys, treaties, and patent, that Congress granted to the Cherokee Nation fee simple title to the entire tract without reservation.

In 1821 Henry Downs, Commissioner, made his report to the Secretary of War of a survey which he had been directed to make of the Choctaw boundary line west of the Mississippi. Mr. Downs states that he made such survey:

> beginning at the mouth of Little River, running thence down Red River to a point three miles below the mouth of Little River, running thence north twenty-nine degrees and fifteen minutes east, one hundred and fifteen miles, ten chains and fifty links to a post on the *south bank* of the Arkansas River, where the *lower boundary* line of the Cherokees strikes the same; running thence with the course of the Arkansas River, to the mouth of the Canadian Fork. (Emphasis added.)

A second survey of the Choctaw line was conducted by Mr. Conway. From the plat which was prepared, it appears that the northern terminus of the Choctaw line

ceases at a point on the south bank of the Arkansas River, or in the Channel of the River.[16]

In 1831-1832 Reverend Isaac McCoy surveyed the Cherokee line from the southwest corner of Missouri to Ft. Smith on the Arkansas River. From his field notes it is clear that the Arkansas River was included within the survey.

> Thence along the channel of the river 64.50 chains to the south bank where the northern extremity of the eastern boundary of the Choctaw land strikes the Arkansas.

The quality of the Cherokee fee simple title was clearly understood by Congress and this title has been sustained in prior court proceedings. Recently in 1961 the Cherokee Nation was successful in recovering an award of over 14 million dollars against the Government for the so-called Outlet Lands. The Indian Claims Commission in Case No. 173 determined that the Cherokee Nation obtained by the treaties of 1828, 1833, and 1835 fee simple title to these outlet lands, 9 Ind. Cl. Comm. 162. No one until now has ever challenged or disputed the fee simple title to the Cherokee home tract.

The Court of Appeals in its decision affirming the judgment of the lower court relied upon *United States v. Holt State Bank*, 270 U.S. 49. This case highlights the distinction between aboriginal Indian title and fee simple title. In *Holt State Bank*, the Chippewa Indians by a series of treaties ending in 1854, just prior to Minnesota becoming a state, ceded to the United States their aboriginal title which the tribe held by use and occu-

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[16] The purpose of the recitation of the surveys is not to resolve the dispute between the Cherokees and Choctaws, but to demonstrate that the Arkansas River was intended to be and was included in the metes and bounds survey.

pancy. Among the lands retained as part of their reservation was Mud Lake. The Chippewa Indians had nothing approaching a right to the land underlying Mud Lake. *United States v. Stotts,* 49 F. 2d 619 (W.D. D.C. Wash. 1930). In 1858 Minnesota became a state subject to the right of use and occupancy of land held by the Indians. In 1889 the Indians ceded all their lands to the United States to be sold and the proceeds placed in trust (Act of June 14, 1889, 25 Stat. 642). Sometime after statehood and cession of the lands, including Mud Lake by the Chippewas, to the United States in 1889, Mud Lake was drained, and the state granted the title to the land to homesteaders. The Government contended that the Indians had reserved the title to the land under Mud Lake at the time that Minnesota entered the Union, that title to the land under the lake had not passed to the state under the implied trust-equal footing doctrine, and therefore, the Indians and those who took title from them were the true owners. It must be emphasized that the United States at all times *had the fee simple title* to the land under Mud Lake; the Indians had only the right of use and occupancy. As Mr. Justice Van Devanter stated in the Court's opinion:

> The title to the bed of Mud Lake then passed to the state, if the lake was navigable, and *if the bed had not already been disposed of by the United States.* Id. at 55. (Emphasis added.)

In the case of Mud Lake the Government had not granted the fee simple title to the land to anyone prior to the entry of Minnesota into the Union. The fee was subject only to the right of use and occupancy by the Chippewas. When Minnesota became a state, the fee simple title to the land under Mud Lake passed to the state; and when in 1889 the Indians ceded their right of occupancy to the federal government, the fee simple title held by the state, was left unencumbered.

The Court in *Holt State Bank* determined that the title to the land under Mud Lake passed to the State of Minnesota under the equal footing doctrine because (1) the lands had not been previously disposed of and (2) "there was nothing in this which even approaches a grant of rights in lands underlying navigable waters; *nor anything evincing a purpose to depart from* the established policy, before stated, of treating such lands as held for the benefit of the future state." *United States v. Holt State Bank*, 270 U.S. 49, 55, 58, 59.

In the case here presented the United States Government by the series of treaties beginning in 1828 granted to the Cherokee Nation *fee simple title* to the land in question. The title was guaranteed and evidenced by the patent of 1838. This title has remained in the tribe, and it is this title which the tribe asserts as the basis for its demand for an accounting.

B. The Intention of Congress with Regard to the Scope of the Grant

It has been asserted both by the respondents and the Court of Appeals that the treaties and patent did not convey title to the land under the navigable portion of the Arkansas River because there was no express language in the documents nor any manifestation of Congressional intent to do so. The combination of treaty and patent languages evinces the clear intent to cede the Cherokee Nation everything within the description. The manifestation of intent required by the appellate court to sustain such a grant is far greater than that required by this Court. In attempting to elicit the intent of the parties with regard to the meaning and purpose of a particular treaty, this Court has sought *anything* which would evince a purpose to depart from the established policy of holding such lands for a future state. *United States v. Holt State Bank*, 270 U.S. 49, 59.

In order to interpret treaties and patents, such as those in the instant case, the Court must appreciate the circumstances in which the treaties were drawn and words used; the Court must consider the location of the land, the situation and needs of the Indians, and the object to be attained. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78. The Court of Appeals by asserting that nothing passes from the sovereign by implication[17] and demanding a manifestation of intent far greater than ever previously required, has taken a position contrary to the weight of decided Indian cases. *Holt State Bank*, rather than supporting the Court of Appeals, buttresses the position of the Cherokee Nation. Unlike the Court of Appeals in this case which focused on only one fact, the treaty provision that no state would be formed in the ceded lands, this Court in *Holt State Bank* examined and weighed all the factors and circumstances to arrive at the intent of the parties. See App. 141a. *Holt State Bank*, when it was decided by Mr. Justice Van Devanter, was grounded on the rules of construction for interpretation of Indian treaties.

In construing Indian treaties, the usual rules of construction do not apply. The Indians as a dependent people are under the protection of the Government, and treaties are to be interpreted liberally in their favor. *Jones v. Meehan*, 175 U.S. 1; *Blue Jacket v. Johnson County*, 72 U.S. [5 Wall.] 737. Indeed, the Court in *Holt State Bank* asked not for a clear manifestation of intent, but *anything* that would evince a public purpose

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[17] The two cases relied upon by the Court of Appeals, *Northern Pacific Ry. Co. v. Soderberg*, 188 U.S. 526, and *Caldwell v. United States*, 250 U.S. 14, are not Indian cases. In dealing with Indians, a dependent people under the protection of the Government, treaties are construed more liberally for their benefit.

to depart from the policy of treating lands as held for the benefit of future states.[18]

The intent and sense of the treaties is to be obtained not only from the words of the documents, but from the circumstances and contemporaneous events and from the habits and way of life of the Indian tribe.[19] When Congress granted the Cherokee Nation some fourteen million acres as its home, it fully intended the Nation to be relocated and reconstituted as sovereign in its own land. Congress and the Executive wanted no further conflict, no further contact with these Indians.[20] Indeed, it was for this reason that the Government provided "for conveyance of the whole of it by patent in fee simple and also for the security of necessary political rights and for preventing white persons from trespassing upon you." See Appendix G, *infra,* Address of President Jackson to the Cherokees, March 16, 1835, Senate Doc. 1, Twenty fourth Cong. first sess. p. 25.

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[18] As discussed at pp. 30-31, *infra,* the Court in *Holt State Bank* grasped the distinction between aboriginal Indian title and fee simple title. The Court well knew that without some manifestation of intent, mere occupancy and use of the land would give the Indians no permanent claim against the fee simple title which passed to the state. See *Moore v. United States*, 157 F.2d 760, 765.

[19] The Court said in *United States v. Winans,* 198 U.S. 371, 380-81, "...[W]e will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all case where power is exerted by the strong over those to whom they owe care and protection, and counter poise the inequality by the superior justice which looks only to the substance of the right, without regard to technical rules' "

[20] Prior to 1906, the United States pursued a policy of exchange and removal whereby the Indians were kept separate and isolated from the white settlers and settlements.

An examination of the treaties in question manifests the clear intent of Congress to relocate and establish the Cherokee Nation in new lands over which it could exercise the same use, dominion and control as it did in its former lands. The treaty of New Echota with the Cherokee Nation cannot be examined in a vacuum.

Congress was very familiar with the Cherokee Nation; its treaty dealings with the tribe went back to 1785. Congress had long recognized the sovereignty of the Nation. The nature of this sovereignty had been described by Mr. Chief Justice Marshall in *Worcester v. State of Georgia*, 31 U.S. [6 Pet.] 515, 556. The Cherokee Nation as sovereign on its lands could exclude white settlers from crossing its land or navigating on the Tennessee River. The Cherokee Nation was an educated, agricultural, political society. Accordingly, it was Congress' intent in removing the Cherokee Nation to the West to establish it in the same condition. The purpose and intent of Congress is clearly manifested in the Preamble to the Treaty of New Echota.

> Whereas the Cherokees are anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States under the jurisdiction and laws of the State Government may be terminated and adjusted; and with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the State sovereignties, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their *views, habits*, and *condition*: and as may tend to their individual comfort and their advancement in civilization. (Emphasis added.)

This Court has previously recognized the unique situation created with the Cherokee Nation. In *Atlantic & Pacific Railroad Co. v. Mingus*, 165 U.S. 413, 435, 436, it was emphasized that "a reference to some of the treaties under which it [the land in Oklahoma] is held by the Indians indicates that it stands in an entirely different relationship to the United States from other territories and that for most purposes it is to be considered an *independent country*." (Emphasis added.)

Congress in its treaties assured to the Cherokee Nation the power to exclude white men from crossing or using its land without its permission. See Articles 5 and 6 of the Treaty of 1835, Appendix C, *infra.* In many of the contemporaneous speeches interpreting the treaty, it was stated that white persons would be prevented from trespassing upon the tribal land.

The Congress and proponents of the treaties emphasized:

> There Cherokees, you will make laws for yourself, and establish such government as in your estimation may be best suited to your condition. There Cherokees in your new country you will be far beyond the limits or jurisdiction of any State or Territory. The *country will be yours exclusively*. No other people can make claim to it, and you will be protected by the vigilant power of the United States against the intrusion of the white man. (Emphasis added.) Ex. papers no. 64, Eighteenth Congress, 2d sess., talk of special agent Mason to Cherokee Council at Red Clay, East Tennessee, July 31, 1837. See Appendix H. *infra.*

The intent of Congress to establish the Cherokee Nation in a permanent home preserving its tribal integrity and sovereignty must mean that the Cherokee Na-

tion received fee simple title to all the property within the metes and bounds description, including the Arkansas River.

It is an established guide for interpretation that the Court consider the way of life of the Indian tribe in order to fix the extent of the treaty grant. *United States v. Winans*, 198 U.S. 371.

The prior habits and condition of the Cherokee Nation demonstrate a need and use for the Arkansas River. In their former lands the Cherokees used the streams and rivers as avenues of commerce, for food, for irrigation, and other purposes. Although there were no express words in the grant, several treaties have been interpreted to include within the grant of upland and shore land, the title to the land below the navigable waters because such was essential to the enjoyment of the land and was consonant with the customs and habits of the tribe. *Winters v. United States*, 207 U.S. 564; *Alaska Pacific Fisheries v. United States*, 248 U.S. 78; see also *Menominee Tribe of Indians v. United States*, 391 U.S. 404, footnote 2.

It is also important in attempting to arrive at the sense of the treaties and the intent of the parties, to look at the events which took place subsequent to the action in question. In the case of the Cherokee Nation it always considered itself the owner of the land under the Arkansas River. Long before the admission of Oklahoma into the Union, the Cherokee Nation worked the river for sand and gravel and negotiated sand and gravel leases with many companies and received royalties for such minerals.[21]

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[21] See Appendix I, *infra*, which is a letter from the Oklahoma Historical Society setting forth some of the leases; also as part of Appendix I is a certified copy of the Register of Mineral License

(Cont'd on p. 38)

Congress understood the way of life of the Cherokee Nation, and it is clear that Congress wanted to preserve it.

The intent of Congress to convey title to all the land, including that under the Arkansas River, within the metes and bounds description is also demonstrated by the fact that Congress conveyed the land in one vast tract and executed its *first patent* with an Indian tribe expressly setting forth and memorializing the metes and bounds description,[22] without exception or reservation. Appendix D, *infra*. It is also significant to note the precise words used in the patent.

> thence from the lower bank of Verdigris river on the *north Bank of Arkansas* river south forty-four degrees, thirteen minutes, east, fifty seven chains, to a post on the *south bank of Arkansas* opposite the eastern bank of Neosho river at its junction with Arkansas, * * thence south fifty three degrees west, one mile, to a post * * thence

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[21] (Cont'd from p. 37)
dated April 12, 1884, to March 9, 1891. After the admission of Oklahoma into the Union, the Supreme Court of Oklahoma in *Lynch v. Clemens* 263 P.2d 153; (Okla. 1953) and *Vickery v. Yahola Sand & Gravel Co.*, 158 Okla. 120, 12 p. 2d 881 (1932) determined that the riverbed passed to the State upon admission and the Cherokee allottees claiming sand and gravel royalties were not entitled to them. These two cases were, petitioner submits, erroneously decided and are not binding upon this Court.

[22] The treaties of 1833 and 1835 read ". . . down the Canadian to the Arkansas; . . ." The Patent of 1838 uses confirming and consistent terms ". . . down the Canadian River on its north bank to its junction with Arkansas; . . ." Since the Canadian is flowing toward the northeast at that point the junction point would be on the south bank of the Arkansas River, thereby encompassing the river.

> south eighteen degrees, eighteen minutes west thirty three miles, twenty-eight chains and eighty links, to a rock * * thence south four miles, to a post, on the lower bank of the north fork of Canadian river, at its junction with Canadian river, * * * thence down the Canadian river on its north bank to its junction with Arkansas river; *thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of* the *lands of the Choctaws on the south bank of Arkansas river*, four chains and fifty four links east of Fort Smith;

The Court of Appeals and the respondents assert that these terms are mere reference points. However, by use of these references, it is clear that the Arkansas River is included within the grant under the dominion and control of the patentee, the Cherokee Nation. The patent uses words of art such as "down the main channel." In international law and usage of European nations, adopted by this country, the terms "middle of the stream" and "mid channel of a navigable river" are synonymous and interchangeably used when determining what is to be the boundary between states. In *State of Iowa v. State of Illinois*, 147 U.S. 1, 10, this Court analyzed such terms.

> The Enabling Act ... under which Wisconsin adopted a constitution and became a state and was admitted into the Union, gives the western boundary of that state, after reaching the river St. Croix as follows: Thence *down the main channel* of said river to the Mississippi, thence *down the centre of the main channel* ... are synonymous. [Emphasis added.]

This Court also determined that the meaning of the term "channel" referred not to the navigable waters, but to the riverbed.

> On the other hand, the bed of the main river designated by the word *channel*, used in its primary sense, is the great body of water flowing down the stream ... the broad and distinctly defined *bed of the main river*. Id. at 12. (Emphasis added.)

The effect of such grants to the mid-channel or down the main channel is to bestow upon the grantee jurisdiction, sovereignty over the river to the thread of the stream. Id. at 12. Such jurisdiction or sovereignty carries with it proprietary rights, *e.g.*, alluvial soil. *Anderson-Tully Co. v. Tingle*, 166 F.2d 224 (5th Cir. 1948).

Again it must be reiterated that the combination of treaty and patent language evinces the clear intent to cede to the Cherokee Nation everything within the description. See *Choate v. Trapp*, 224 U.S. 665, 673, "the patent and legislation of Congress must be construed together," when so construed, they demonstrate the intent of Congress. "It is also a rule of construction that when one section of a statute treats specially and solely, of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto." *Griffith v. Carter*, 8 Kan. 565 (1871). Congress and the Executive were under no obligation to promise a patent in fee simple, yet this is precisely what was done. In so doing, the patent included the Arkansas River within its description, without any exception or reservation. This action is a clear and convincing manifestation of Congressional intent, in and of itself. Certainly the language of the treaty and patent take even greater significance when coupled with the other circumstances here related.

CONCLUSION

For all these reasons herein stated, the judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

Excerpts

TREATY WITH THE WESTERN CHEROKEE MAY 6, 1828
(7 Stat. 311, Vol. II, Kappler, 288)
Proclaimed May 28, 1828

Articles of a Convention, concluded at the City of Washington this sixth day of May, in the year of our Lord one thousand eight hundred and twenty-eight, between James Barbour, Secretary of War, being especially authorized therefor by the President of the United States, and the undersigned, Chiefs and Head Men of the Cherokee Nation of Indians, West of the Mississippi, they being duly authorized and empowered by their Nation.

Whereas, it being the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians, as well as those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, or any of the limits of any existing Territory or State; and, Whereas, the present location of the Cherokees in Arkansas being unfavorable to their present repose, and tending, as the past demonstrates, to their future degradation and misery; and the Cherokees being anxious to avoid such consequences, and yet not questioning their right to their lands in Arkansas, as secured to them by Treaty, and resting also upon the pledges given them by the President of the United States, and the Secretary of War, of March, 1818, and 8th October, 1821, in regard to the outlet to the West, and as may be seen on referring to the records

of the War Department, still being anxious to secure a permanent home, and to free themselves, and their posterity, from an embarrassing connexion with the Territory of Arkansas, and guard themselves from such connexion in future; and, Whereas, it being important not to the Cherokees only, but also to the Choctaws, and in regard also to the question which may be agitated in the future respecting the location of the latter, as well as the former, within the limits of the Territory or State of Arkansas, as the case may be, and their removal therefrom; and to avoid the cost which may attend negotiations to rid the Territory or State of Arkansas whenever it may become a State, of either, or both of those Tribes, the parties hereto do hereby conclude the following Articles, viz:

ARTICLE 1. The Western boundary of Arkansas shall be, and the same is, hereby defined, viz: A line shall be run, commencing on Red River, at the point where the Eastern Choctaw line strikes said River, and run due North with same line to the River Arkansas, thence in a direct line to the South West corner of Missouri.

ARTICLE 2. The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded as follows, viz: Commencing at that point on Arkansas River where the Eastern Choctaw boundary line strikes said River, and running thence with the Western line of Arkansas, as defined in the foregoing article, to the South-West corner of Missouri, and thence with the Western boundary line of Missouri till it crosses the waters of Neosho, generally called Grand River, thence due West to a point from which a due South course will strike the present North-West corner of Arkansas Territory, thence continuing due South, on and with the present boundary line of the Territory to the main branch of Arkansas River, and thence down said River to its junction with the Canadian

River, and thence up and between the said Rivers Arkansas and Canadian, to a point at which a line running North and South from River to River, will give the aforesaid seven millions of acres. In addition to the seven millions of acres thus provided for, and bounded, the United States further guarantee to Cherokee Nation a perpetual outlet, West, and a free and unmolested use of all the Country lying West of the Western boundary of the above described limits, and as far west as the sovereignty of the United States, and their right of soil extend.

ARTICLE 3. The United States agree to have the lines of the above cession run without delay, say not later than the first of October next, and to remove, immediately after the running of the Eastern line from the Arkansas River to the South-West corner of Missouri, all white persons from the West to the East of said line, and also all others, should there be any there, who may be unacceptable to the Cherokees, so that no obstacles arising out of the presence of a white population, or a population of any sort, shall exist to annoy the Cherokees—and also to keep all such from the West of said line in future.

* * *

ARTICLE 8. The Cherokee Nation, West of the Mississippi having, by this agreement, freed themselves from the harassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and their posterity, under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extend of unembarrassed country; and that their Brothers yet remaining in the States may be induced to join them and enjoy the repose and blessing of such a State in the future, it is further agreed, on the part of the United States, that to each Head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States, East of the Mississippi, who may desire to remove West, shall be given * * *.

ARTICLE 9. It is understood and agreed by the parties to this Convention, that a Tract of Land, two miles wide and six miles long, shall be, and the same is hereby, reserved for the use and benefit of the United States, for the accommodation of the military force which is now, or which may hereafter be, stationed at Fort Gibson, on the Neosho, or Grand River, to commence on said River half a mile below the aforesaid Fort, and to run thence due East two miles, thence Northwardly six miles, to a point which shall be two miles distant from the River aforesaid, thence due West to the said River, and down it to the place of beginning. And the Cherokees agree that the United States shall have and possess the right of establishing a road through their country for the purpose of having a free and unmolested way to and from said Fort.

* * *

ARTICLE 11. This Treaty to be binding on the contracting parties so soon as it is ratified by the President of the United States, by and with the advice and consent of the Senate.

Done at the place, and on the day and year above written.

James Barbour	(L.S.)
Black Fox, his x mark,	(L.S.)
Thomas Graves, his x mark,	(L.S.)
George Guess,[a]	(L.S.)
Thomas Maw,[a]	(L.S.)
George Marvis,[a]	(L.S.)
John Looney,[a]	(L.S.)
John Rogers,	(L.S.)
J. W. Flawey, counsellor of Del.	(L.S.)
Chiefs of the delegation	

[a] Written by the signers in their language, and in the characters now in use among them, as discovered by George Guess.

Witnesses:

Thos. L. McKenney
James Rogers, interpreter,
D. Kurtz,
H. Miller,
Thomas Murray,
D. Brown, secretary Cherokee delegation,
Pierye Pierya,
E. W. Duval, United States agent, etc.

Ratified with the following proviso:

"Provided, nevertheless, that the said convention shall not be so construed as to extend the northern boundary of the 'perpetual outlet west,' provided for and guaranteed in the second article of said convention, north of the thirty-sixth degree of north latitude or so as to interfere with the lands assigned, or to be assigned, west of the Mississippi river, to the Creek Indians who have emigrated, or may emigrate, from the States of Georgia and Alabama, under the provisions of any treaty or treaties heretofore concluded between the United States and the Creek tribe of Indians; and provided further, That nothing in the said convention shall be construed to cede or assign to the Cherokees any lands heretofore ceded or assigned to any tribe or tribes of Indians, by any treaty now existing and in force, with any such tribe or tribes."

DEPARTMENT OF WAR,
31st May, 1828.

TO THE HON. HENRY CLAY,
Secretary of State:

SIR: I have the honor to transmit, herewith, the acceptance of the terms, by the Cherokees, upon which the recent convention with them was ratified. You will have the goodness to cause the same to be attached to the treaty, and published with it.

I have the honor to be, very respectfully, your obedient servant,

SAM'L. L. SOUTHARD.

COUNCIL ROOM, WILLIAMSON'S HOTEL,
Washington, May 31st, 1828.

TO THE SECRETARY OF WAR,
Washington City:

SIR: The undersigned, chiefs of the Cherokee nation, west of the Mississippi, for and in behalf of said nation, hereby agree to, and accept of, the terms upon which the Senate of the United States ratified the convention, concluded at Washington on the sixth day of May, 1828, between the United States and said nation.

In testimony whereof, they hereunto, subscribe their names and affix their seals.

Thomas Graves, his x mark,	(L.S.)
George Maw, his x mark,	(L.S.)
George Guess, his x mark,	(L.S.)
Thomas Marvis, his x mark,	(L.S.)
John Rogers,	(L.S.)

Signed and sealed in the presence of–

E. W. Duval, United States agent, etc.
Thomas Murray,
James Rogers, interpreter.

APPENDIX B

Excerpts

TREATY WITH THE WESTERN CHEROKEE
FEBRUARY 14, 1833
(7 Stat. 414, Vol. II, Kappler, 385)
Proclaimed April 12, 1834

Articles of agreement and convention made and concluded at Fort Gibson, on the Arkansas river on the fourteenth day of Febraury one thousand eight hundred and thirty-three, by and between Montfort Stokes, Henry L. Ellsworth and John F. Schermerhorn duly appointed Commissioners on the part of the United States and the undersigned Chiefs and Head-men of the Cherokee nation of Indians west of the Mississippi, they being duly authorized and empowered by their nation.

Whereas articles of convention were concluded at the city of Washington, on the sixth day of May one thousand eight hundred and twenty-eight, between James Barbour Secretary of War, being specially authorized therefor by the President of the United States, and the chiefs and head-men of the Cherokee nation of Indians west of the Mississippi, which articles of convention were duly ratified. And whereas it was agreed by the second article of said convention as follows "That the United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is solemnly pledged, of seven millions of acres of land, said land to be bounded as follows; viz, commencing at a point on Arkansas river, where the eastern Choctaw boundary line strikes said river, and running thence with the western line of Arkansas Territory to the southwest corner of Missouri, and thence with the western boundary line of Missouri till it crosses the waters of Neosho, generally called Grand River, thence due west, to a point from which a due south course will strike the present northwest corner of Arkansas Territory, thence continuing due south on and with the present

boundary line on the west of said Territory, to the main branch of Arkansas river, thence down said river to its junction with the Canadian, and thence up, and between said rivers Arkansas and Canadian to a point at which a line, running north and south, from river to river, will give the aforesaid seven millions of acres, thus provided for and bounded. The United States further guarantee to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits; and as far west, as the sovereignty of the United States and their right of soil extend. And whereas there was to said articles of convention and agreement, the following proviso viz. "Provided nevertheless, that said convention, shall not be so construed, as to extend the northern boundary of said perpetual outlet west, provided for and guaranteed in the second article of said convention, north of the thirty-sixth degree of north latitude, or so as to interfere with the lands assigned, or to be assigned, west of the Mississippi river, to the Creek Indians who have emigrated, or may emigrate, from the States of Georgia and Alabama, under the provisions of any treaty, or treaties, heretofore concluded, between the United States and the Creek tribe of Indians—and provided further, that nothing in said convention, shall be construed, to cede, or assign, to the Cherokees any lands heretofore ceded, or assigned, to any tribe, or tribes of Indians, by any treaty now existing and in force, with any such tribe or tribes." —And whereas, it appears from the Creek treaty, made with the United States, by the Creek nation, dated twenty-fourth day of January eighteen hundred and twenty-six, at the city of Washington; that they had the right to select, and did select, a part of the country described within the boundaries mentioned above in said Cherokee articles of agreement—and whereas, both the Cherokee and Creek nations of Indians west of the Mississippi, anxious to have their boundaries settled in an

amicable manner, have met each other in council, and, after full deliberation mutually agreed upon the boundary lines between them—Now, therefore, the United States on one part, and the chiefs and head-men of the Cherokee nation of Indians west of the Mississippi on the other part agree as follows:

ARTICLE I. The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee, is hereby pledged, of seven millions of acres of land, to be bounded as follows viz: Beginning at a point on the old western territorial line of Arkansas Territory, being twenty-five miles north from the point, where the Territorial line crosses Arkansas river—thence running from said north point, south, on the said Territorial line to the place where said Territorial line crosses the Verdigris river—thence down said Verdigris river, to the Arkansas, thence down said Arkansas to a point, where a stone is placed opposite to the east or lower bank of Grand river at its junction with the Arkansas—thence running south, forty-four degrees west, one mile—thence in a straight line to a point four miles northerly from the mouth of the north fork of the Canadian—thence along the said four miles lines to the Canadian—thence down the Canadian to the Arkansas—thence, down the Arkansas, to that point on the Arkansas, where the eastern Choctaw boundary strikes, said river; and running thence with the western line of Arkansas Territory as now defined, to the south-west corner of Missouri—thence along the western Missouri line, to the land assigned the Senecas; thence, on the south line of the Senecas to Grand river; thence, up said Grand river, as far as the south line of the Osage reservation, extended if necessary—thence up and between said south Osage line, extended west if necessary and a line drawn due west, from the point of beginning, to a certain distance west, at which, a line running north and south, from said Osage line, to said due west line, will make seven millions of acres within the whole described

boundaries. In addition to the seven millions of acres of land, thus provided for, and bounded, the United States, further guarantee to the Cherokee nation, a perpetual outlet west and a free and unmolested use of all the country lying west, of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extended–Provided however, that if the saline, or salt plain, on the great western prairie, shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men, to get salt on said plain in common with the Cherokees–and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed.

ARTICLE II. The Cherokee nation hereby relinquishes and quit claim to the United States all the right interest and title which the Cherokees have, or claim to have and to all the land ceded, or claimed to have been ceded to said Cherokee nation by said treaty of sixth of May one thousand eight hundred and twenty-eight, and not embraced within the limits or boundaries fixed in this present supplementary treaty or articles of convention and agreement.

ARTICLE III. The Cherokee nation, having particularly requested the United States to annul and cancel the sixth article of said treaty of sixth May, one thousand eight hundred and twenty-eight, the United States, agree to cancel the same, and the same is hereby annulled–Said sixth article referred to, is in the following words–"It is moreover agreed by the United States, when the Cherokees may desire it, to give them a plain set of laws, suited to their condition–also when they may wish to lay off their lands and own them individually, a surveyor shall be sent to survey them at the expense of the United States.

* * *

ARTICLE V. These articles of agreement and convention are to be considered supplementary, to the treaty before mentioned between the United States, and the Cherokee nation west of the Mississippi dated sixth of May one thousand eight hundred and twenty-eight, and not to vary the rights of the parties to said treaty, any further, than said treaty is inconsistent with the provisions of this treaty, now concluded, or these articles of convention or agreement.

ARTICLE VI. It is further agreed by the Cherokee nation, that one mile square shall be reserved and set apart from the lands hereby guaranteed, for the accommodation of the Cherokee agency; and the location of the same shall be designated by the Cherokee nation, in conjunction with the agent of the Government of the United States.

ARTICLE VII. This treaty, or articles of convention, after the same have been ratified, by the President and Senate shall be obligatory on the United States and said Cherokee nation.

In testimony whereof, the said Montfort Stokes, Henry L. Ellsworth, and John F. Schermerhorn, commissioners as aforesaid and the chiefs and head men of the Cherokee nation aforesaid, have hereunto set their hands, at Fort Gibson on the Arkansas river, on the 14th day of February, one thousand eight hundred and thirty-three.

Montfort Stokes,
Henry L. Ellsworth,
J. F. Schermerhorn,
John Jolly, his x mark,
Black Coat, his x mark,
Walter Webber,
Principal Chiefs:
John Rogers, president commissioners,
Glass, president council.

SIGNED, sealed, and delivered in our presence:

S. C. Stambaugh, secretary commissioners,
M. Arbuckle, colonel Seventh Infantry,
Geo. Vashon, agent Cherokees west,
Jno. Campbell, agent Creeks.
Alexander Brown, his x mark,
Jno. Hambly,
Interpreters,
William Nesbitt,
Peter A. Cams,
N. Young, major U.S. Army
W. Seawell, lieutenant Seventh Infantry,
Wm. Thornton, clerk committee
Charles Webber, clerk council.

APPENDIX C

Excerpts

TREATY WITH THE CHEROKEE, DECEMBER 29, 1835.
(7 Stat. 478, Vol. II, Kappler, 439)
Proclaimed May 23, 1836.

Articles of a treaty, concluded at New Echota in the State of Georgia on the 29th day of Decr. 1835 by General William Carroll and John F. Schermerhorn commissioners on the part of the United States and the Chiefs Head Men and People of the Cherokee tribe of Indians.

Whereas the Cherokees are anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States under the jurisdiction and laws of the State Government may be terminated and adjusted; and with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the State sovereignties, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their views, habits and condition; and as may tend to their individual comfort and their advancement in civilization.

And whereas a delegation of the Cherokee nation composed of Messrs. John Ross Richard Taylor Danl. McCoy Samuel Gunter and William Rogers with full power and authority to conclude a treaty with the United States did on the 28th day of February 1835 stipulate and agree with the Government of the United States to submit to the Senate to fix the amount which should be allowed the Cherokees for their claims and for a cession of their lands east of the Mississippi river, and did agree to abide by the award of the Senate of the United States themselves and

to recommend the same to their people for their final determination.

And whereas on such submission the Senate advised "that a sum not exceeding five millions of dollars be paid to Cherokee Indians for all their lands and possessions east of the Mississippi river."

And whereas this delegation after said award of the Senate had been made, were called upon to submit propositions as to its disposition to be arranged in a treaty which they refused to do, but insisted that the same "should be referred to their nation and there in general council to deliberate and determine on the subject in order to ensure harmony and good feeling among themselves."

And whereas a certain other delegation composed of John Ridge, Elias Boudinot, Archilla Smith, S. W. Bell, John West, Wm. A. Davis and Ezekiel West, who represented that portion of the nation in favor of emigration to the Cherokee country west of the Mississippi entered into propositions for a treaty with John F. Schermerhorn commissioner on the part of the United States which were to be submitted to their nation for their final action and determination:

And whereas the Cherokee people, at their last October council at Red Clay, fully authorized and empowered a delegation or committee of twenty persons of their nation to enter into and conclude a treaty with the United States commissioners then present, *at that place or elsewhere* and as the people had good reason to believe that a treaty would then and there be made or at a subsequent council at New Echota which the commissioners it was well known and understood, were authorized and instructed to convene for said purpose; and since the said delegation have gone on to Washington City, with a view to close negotiations there, as stated by them notwithstanding they

were officially informed by the United States commissioner that they would not be received by the President of the United States; and that the Government would transact no business of this nature with them, and that if a treaty was made it must be done here in the nation, where the delegation at Washington last winter *urged that it should be done for the purpose of promoting peace and harmony among the people;* and since these facts have also been corroborated to us by a communication recently received by the commissioner from the Government of the United States and read and explained to the people in open council and therefore believing said delegation can effect nothing and since our difficulties are daily increasing and our situation is rendered more and more precarious, uncertain, and insecure in consequence of the legislation of the States; and seeing no effectual way of relief, but in accepting the liberal overtures of the United States.

And whereas Genl William Carroll and John F. Schermerhorn were appointed commissioners on the part of the United States, with full power and authority to conclude a treaty with the Cherokees east and were directed by the President to convene the people of the nation in general council at New Echota and to submit said propositions to them with power and authority to vary the same so as to meet the views of the Cherokees in reference to its details.

And whereas the said commissioners did appoint and notify a general council of the nation to convene at New Echota on the 21st day of December 1835; and informed them that the commissioners would be prepared to make a treaty with the Cherokee people who should assemble there and those who did not come they should conclude gave their assent and sanction to whatever should be transacted at this council and the people having met in couniel [sic] according to said notice.

Therefore the following articles of a treaty are agreed upon and concluded between William Carroll and John F. Schermerhorn commissioners on the part of the United States and the chiefs and head men and people of the Cherokee nation in general council assembled this 29th day of Decr. 1835.

ARTICLE 1. The Cherokee nation hereby cede relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi river, and hereby release all their claims upon the United States for spoliations of every kind for and in consideration of the sum of five millions of dollars to be expended paid and invested in the manner stipulated and agreed upon in the following articles, but as a question has arisen between the commissioners and the Cherokees whether the Senate in their resolution by which they advised "that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river" have included and made any allowance or consideration for claims for spoliations it is therefore agreed on the part of the United States that this question shall be again submitted to the Senate for their consideration and decision and if no allowance was made for spoliations that then an additional sum of three hundred thousand dollars be allowed for the same.

ARTICLE 2. Whereas by the treaty of May 6th 1828 and the supplementary treaty thereto of Feb. 14th 1833 with the Cherokees west of the Mississippi the United States guarantied [sic] and secured to be conveyed by patent, to the Cherokee nation of Indians the following tract of country "Beginning at a point on the old western territorial line of Arkansas Territory being twenty-five miles north from the point where the territorial line crosses Arkansas river, thence running from said north point south on the said territorial line where the said

territorial line crosses Verdigris river; thence down said Verdigris river to the Arkansas river; thence down said Arkansas to a point where a stone is placed opposite the east or lower bank of Grand river at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence in a straight line to a point four miles northerly, from the mouth of the north fork of the Canadian; thence along the said four mile line to the Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river and running thence with the western line of Arkansas Territory as now defined, to the southwest corner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand river; thence up said Grand river as far as the south line of the Osage reservation, extended if necessary; thence up and between said south Osage line extended west if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend:

Provided however That if the saline or salt plain on the western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees; And letters patent shall be issued by the United States as soon as practicable for the land hereby guarantied [sic]."

And whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi the United States in consideration of the sum of five hundred thousand dollars therefore hereby convenant and agree to convey to the said Indians, and their descendants by patent, in fee simple the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation beginning at the southeast corner of the same and runs north along the east line of the Osage lands fifty miles to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land; but it is expressly understood that if any of the lands assigned the Quapaws shall fall within the aforesaid bounds the same shall be reserved and excepted out of the lands above granted and a prorata reduction shall be made in the price to be allowed to the United States for the same by the Cherokees.

ARTICLE 3. The United States also agrees that the lands above ceded by the treaty of Feb. 14, 1833, including the outlet, and those ceded by this treaty shall all be included in one patent executed to the Cherokee nation of Indians by the President of the United States according to the provisions of the act of May 28, 1830. It is, however, agreed that the military reservation at Fort Gibson shall be held by the United States. But should the United States abandon said post and have no further use for the same it shall revert to the Cherokee nation. The United States shall always have the right to make and establish such post and military roads and forts in any part of the Cherokee country, as they may deem proper for the interest and protection of the same and the free

use of as much land, timber, fuel and materials of all kinds for the construction and support of the same as may be necessary; provided that if the private rights of individuals are interfered with, a just compensation therefor shall be made.

* * *

ARTICLE 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.

ARTICLE 6. Perpetual peace and friendship shall exist between the citizens of the United States and the Cherokee Indians. The United States agree to protect the Cherokee nation from domestic strife and foreign enemies and against intestine wars between the several tribes. The Cherokees shall endeavor to preserve and maintain the peace of the country and not make war upon their neighbors they shall also be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by

order of the President of the United States. But this is not intended to prevent the residence among them of useful farmers, mechanics, and teachers for the instruction of Indians according to treaty stipulations.

ARTICLE 7. The Cherokee nation having already made great progress in civilization and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition as well as to guard and secure in the most effectual manner the rights guarantied [sic] to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the Government of the United States towards the Indians in their removal beyond the territorial limits of the States, it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same.

ARTICLE 8. The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there and that a sufficient number of steamboats and baggage-wagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the Government. Such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of their family; and in lieu of their one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents if they prefer it.

Such Cherokees also as reside at present out of the nation and shall remove with them in two years west of the Mississippi shall be entitled to allowance for removal and subsistence as above provided.

* * *

ARTICLE 11. The Cherokee nation of Indians believing it will be for the interest of their people to have all their funds and annuities under their own direction and future disposition hereby agree to commute their permanent annuity of ten thousand dollars for the sum of two hundred and fourteen thousand dollars, the same to be invested by the President of the United States as a part of the general fund of the nation; and their present school fund amounting to about fifty thousand dollars shall constitute a part of the permanent school fund of the nation.

* * *

ARTICLE 19. This treaty after the same shall be ratified by the President and Senate of the United States shall be obligatory on the contracting parties.

ARTICLE 20. (Supplemental article. Stricken out by Senate.)

In testimony whereof, the commissioners and the chiefs, head men, and people whose names are hereunto annexed, being duly authorized by the people in general council assembled, have affixed their hands and seals for themselves, and in behalf of the Cherokee nation.

I have examined the foregoing treaty, and although not present when it was made, I approve its provisions generally, and therefore sign it.

William Carroll,
J. F. Schermerhorn.

Major Ridge, his x mark	(L.S.)	Te-gah-e-ske, his x mark	(L.S.)
James Foster, his x mark,	(L.S.)	Robert Rogers,	(L.S.)
Tesa-ta-esky, his x mark	(L.S.)	John Gunter,	(L.S.)
Charles Moore, his x mark,	(L.S.)	John A. Bell,	(L.S.)
George Chambers, his x mark,	(L.S.)	Charles F. Foreman,	(L.S.)
Tah-yeske, his x mark,	(L.S.)	William Rogers,	(L.S.)
Archilla Smith, his x mark,	(L.S.)	George W. Adair,	(L.S.)
Andrew Ross,	(L.S.)	Elias Boudinot,	(L.S.)
William Lassley,	(L.S.)	James Starr, his x mark	(L.S.)
Cae-te-hee, his x mark,	(L.S.)	Jesse Half-breed, his x mark,	(L.S.)

Signed and sealed in the presence of–

Western B. Thomas, secretary.
Ben F. Currey, special agent.
M. Wolfe Batman, first lieutenant, six U.S. Infantry, disbursing agent.
Jon L. Hooper, lieutenant, fourth Infantry.
C. M. Hitchcock, M.D. assistant surgeon U.S.A.
G. W. Currey,
William H. Underwood,
Cornellius D. Terhune,
John W. H. Underwood.

In compliance with instruction of the council at New Echota, we sign this treaty.

Stand Watie,
John Ridge.

March 1, 1836
Witnesses:

Elbert Herring,
Alexander H. Everett,
John Robb,
D. Kurtz,
Wm. Y. Hansell,
Samuel J. Potts,
Jno. Litle,
S. Rockwell.

* * *

APPENDIX D

Excerpts

THE UNITED STATES OF AMERICA TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING

WHEREAS, by certain treaties made by the United States of America with the Cherokee Nation of Indians * * it was stipulated and agreed on the part of the United States, * * the United States should guaranty, secure, and convey by Patent, to the said Cherokee Nation, certain tracts of land: the description of which tracts and the terms and conditions on which they were to be conveyed, are * * in the words following, that is to say:—

"ARTICLE 2d WHEREAS, by the treaty of May sixth, one thousand eight hundred and twenty-eight, and the supplementary treaty thereto of February fourteenth, one thousand eight hundred and thirty-three, * * the United States guarantied and secured, to be conveyed by patent to the Cherokee nation of Indians, * * SEVEN MILLIONS OF ACRES within the whole described boundaries.

In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation A PERPETUAL OUTLET WEST, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend.

PROVIDED, HOWEVER, that if the SALINE or SALT PLAIN on the western prairie shall fall within said limits * * the right is reserved to the United States to permit other tribes of red men to get salt on said plain, in common with the Cherokees.

And LETTERS PATENT, shall be issued by the United States as soon as practicable for the land hereby guarantied.

AND WHEREAS, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of FIVE HUNDRED THOUSAND DOLLARS, * * hereby covenant and agree to convey to the said Indians and their descendants, by Patent, in fee simple, the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation, beginning at the south-east corner of the same, and runs north along the east line of the Osage lands fifty miles, to the north-east corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land; * *

ARTICLE 3d. The United States also agree, that the lands above ceded by the treaty of February fouteenth, one thousand eight hundred and thirty-three, including the outlet, and those ceded by this treaty, shall all be included in one PATENT, executed to the Cherokee nation of Indians by the President of the United States, according to the provisions of the Act of May twenty-eighth, one thousand eight hundred and thirty. * *

The United States shall always have the right to make and establish such POST and MILITARY-ROADS and FORTS in any part of the Cherokee country as they may deem proper for the interest and protection of the same, and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same, as may be necessary, Provided, that if the private rights of individuals are interfered with, a just compensation therefor shall be made."–

AND WHEREAS, the United States have caused the said tract of Seven Millions of Acres, together with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows: beginning at a mound of rocks four feet square * * on what has been denominated the old western territorial line of Arkansas Territory twenty-five miles north of Arkansas river; thence south twenty-one miles and twenty eight chains, to a post on the north-east bank of the Verdigris river; * * thence down the Verdigris river, on the northeast bank, with its meanders to the junction of Verdigris and Arkansas rivers; thence from the lower bank of Verdigris river on the north Bank of Arkansas river south forty-four degrees, thirteen minutes, east, fifty seven chains, to a post on the south bank of Arkansas opposite the eastern bank of Neosho river at its junction with Arkansas, * * thence south fifty three degrees west, one mile, to a post * * thence south eighteen degrees, eighteen minutes west thirty three miles, twenty-eight chains and eighty links, to a rock * * thence south four miles, to a post, on the lower bank of the north fork of Canadian river, at its junction with Canadian river, * * * thence down the Canadian river on its north bank to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of Arkansas river, four chains and fifty four links east of Fort Smith; thence north seven degrees twenty five minutes west with the western boundary of the State of Arkansas, seventy-six miles sixty four chains and fifty links, to the south-west corner of the State of Missouri; thence north, on the western boundary of the State of Missouri eight miles, forty nine chains and fifty links, to the north bank of Cowskin, or Seneca river, at a mound six feet square at base and five feet high * * thence west on the southern boundary of the lands of the Senecas, eleven miles and

forty-eight chains, to a post on the east bank of Neosho river; * * thence up Neosho river, with its meanders on the east bank, to the southern boundary of the Osage lands, thirty six chains and fifty links west of the southeast corner of the lands of the Osages, witnessed by a mound of rocks on the west bank of the Neosho river; thence west on the southern boundary of the Osage lands to the line dividing the territory of the United States from that of Mexico two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square * * thence south along the line of the territory of the United States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square * * thence east along the northern boundary of Creek lands, two hundred and seventy-three miles, fifty-five chains and sixty six links, to the beginning, containing within the Survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundredths of an acre.–

AND WHEREAS, the United States have also caused the said tract of Eight hundred thousand acres, to be surveyed, and have ascertained the boundaries thereof * *

THEREFORE, in execution of the agreements and stipulations contained in the said several treaties, the United States have GIVEN and GRANTED and by these presents do GIVE and GRANT, unto the said Cherokee nation, the two tracts of land so surveyed and herein before described, containing in the whole fourteen millions, three hundred and seventy four thousand, one hundred and thirty-five acres and fourteen-hundredths of an acre:

TO HAVE AND TO HOLD THE SAME, together with the rights privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain

on the western prairie, referred to in the second acticle of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty five, which salt plains has been ascertained to be within the limits prescribed for the outlet agreed to be granted by the said article; and subject also to all the other rights reserved to the United States in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are reserved and subject also to the condition provided by the Act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation ceases and abandons the same.–

IN TESTIMONY WHEREOF, I, Martin Van Buren, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made PATENT and the SEAL of the GENERAL LAND OFFICE to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the thirty-first day of December in the year of our Lord one thousand eight hundred and thirty eight, and of the Independence of the United States, the sixty third.

By the President M. VAN BUREN
M. M. GARLAND
Recorder of the General Land Office

APPENDIX E

To Commissioner of Indian Affairs

Westport, Jackson County, Mo.,
September 20, 1837.

SIR: By your instructions of July 5, 1836, I was required to cause the surveys of the Cherokee lands to be completed and to supply every deficiency connected with the subject which at that time prevented the issuing of the patent.

The surveys have been completed, the field notes of which are herewith respectfully submitted, together with duplicate plats of each tract of Cherokee land, also a summary description of the boundaries, and the quantity of acres embraced therein.

The surveys being made agreeably to the requisition of the treaty necessarily divides the Cherokee lands into two distinct tracts, the northeast corner of the one approaching the southwest corner of the other, within a distance of 30 chains. This intervening tract is a slip of unappropriated land lying north of the Quapaws, 1 mile 45 chains and 50 links wide, and extending from the Neosho River, the place where the two Cherokee tracts approach each other, east 25 miles 36 chains and 24,813.39 acres.

The second article of the Cherokee treaty provides that if the salt plain at which the Indians of the various tribes procure salt "should fall within the Cherokee lands, the right should be reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees."

It appears there are two noted places at which the Indians, from time immemorial, have collected salt. *One is on the Cherokee lands.* It is a plain on which salt is formed by solar evaporation, situated on the salt fork of

Arkansas River, about 15 or 20 miles south of their northern boundary and about 220 miles west of the State of Missouri.

The other is said to be a salt rock. It is on Creek lands, 8 or 10 miles south of the southern boundary of the Cherokee lands and about 200 miles west of the State of Arkansas.

The surveyor was unable to visit either of these places; but Osage Indians, who were hunting in the vicinity at the time he passed, pointed out to him the location of both.

Notwithstanding the Cherokee lands are divided into two separate tracts, the second article of the treaty requires both to be included in the same patent.

The fifth article of the treaty requires that the laws which the Cherokees may enact shall be consistent "with such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians." Also, the third article stipulates that the patent to be issued shall be "according to the provisions of the act of May 28, 1830." This act provides that the lands patented "shall revert to the United States if the Indians become extinct or abandon them."

Therefore, while it is required that a patent should secure the lands to the Cherokees and their heirs and successors, it provides that it withholds from them the right to convey the same to other Indians.

To this matter I beg leave to solicit particular attention. It is the hinge upon which turns the weal or woe of all the tribes for which the Government is making provision in this Indian Territory, and vitally affecting the benevolent design of the Government in securing to the tribes the possession of their lands.

If the conveyance be made in terms which could hereafter, by possibility, be construed to authorize the Indians, either collectively or individually, to convey the whole, or any portion thereof, to others than Indians, either forever or for a limited time, white residents would be introduced and the Indian crowded out.

Last winter four chiefs of the Delaware Nation, professing to act by authority and in behalf of the whole, were induced to petition the Government for permission to lease to a certain white man (a citizen of the United States) and his children one section of land. I mention this fact, known to yourself, as an evidence that between the citizens of the United States and the Indians negotiations have already been commenced by which the former hope to obtain a footing within the Indian Territory.

In issuing the patent it will be necessary *to do more* than to guard against *selling* and *leasing*. These two avenues to the ingress of white population being effectually barred, a third will be sought under the pretext of being employed to perform some useful service for the Indians. If an Indian be allowed to introduce a white man into the Indian country as a partner in business, as a clerk, as a laborer, as a physician, or in any capacity whatever, indulgence will be abused by avaricious individuals, or companies of Indians will be hired to form either nominal or real contracts for the introduction of white men, under the name of employes (sic) of the former.

None of the tribes are capable of guarding their own interests, and if they were, in such transactions as these under consideration human nature should not be supposed to be beyond the influence of the temptations of money. The right of introducing into the Indian country any white persons, citizens of the United States or of any other country, can never be safely possessed by any of the tribes until their condition becomes so improved

that they can mingle with the white men without inconvenience.

In the present condition of the tribes, this subject is guarded by laws of Congress, but if the right to the soil be conveyed to the Indians by patent, without reserving in the same instrument their right of connecting white men with them in the occupancy of the land, the power of Congress subsequently to forbid it by law may well be doubted.

This subject acquires importance from the following facts, which I hope will apologize for the earnestness with which I respectfully press its consideration, namely, the case of the Cherokees, now under consideration, is the first that has occurred of issuing a patent to an Indian tribe. The whole or portions of twenty-three tribes are already within this Indian Territory. In all probability the number of tribes will soon exceed thirty. The patent now to be issued will be quoted as a precedent for the future, and no tribe will be content with less authority than is granted to the Cherokees. But irrespective of other tribes, the introduction of white men into the Cherokee country alone would prostrate the designs of the Government to render the Indians secure in their possessions; for the Cherokee lands, embracing in the whole more than 14,000,000 acres, extend from the east to the west of the country designed for Indian settlement and divide in two.

We can not consistently plead, in this case, that if the Indians choose to introduce white men into their country to their own destruction the fault will be theirs, not ours. The same might have been pleaded heretofore in relation to the laws for the preservation and welfare of the Indian tribes. Justice toward a very large majority of them, who are incompetent either to understand or take care of their own interests, and humanity toward the

whole, requires that our Government continue its guardianship.

By the prohibition above alluded to, no inconvenience could arise to any Indians whose circumstances require the assistance of white men. The matter being under the control of the Government of the United States, its laws regulating intercourse with the Indian tribes could always be such as to provide for the emergency. Laws providing for the temporary residence of white men in the Indian country either, for the benefit of the Indians or the Government of the United States, can be amended or repealed whenever their provisions are found to be exceptionable, but the patent under consideration will be unalterable. Of this I presume the Government will be fully aware, and will guard against wiles which afterwards it would be unable to remedy, and which would produce a failure of the experiment so auspiciously entered upon by the Government for the improvement of the condition of this hitherto unfortunate race of men.

Sir, I have the honor to be, with great respect, your obedient servant, (Emphasis supplied)

ISAAC McCOY.

APPENDIX F

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS,
"Washington, D. C., May 11," 1886.

The Honorable,
The Secretary of the Interior.

SIR:–

I have the honor to state that on the 17th of March. 1886, G. W. Harkins, and H. F. Murray, Chickasaw Delegates, addressed a letter to this office, requesting to be informed whether any part of the territory of the Cherokee nation lies south of the Arkansas River, at or near Fort Smith, (Arkansas) or at any other point below the mouth of the Canadian River, to which this office replied on the 26th of the same month, stating that none of the territory of said nation lies south of the Arkansas River, at any point below the mouth of the Canadian River, referring to the treaty with the Cherokees of December 29th, 1835, (7 Stat. 478) and the treaty with the Choctaws and Chickasaws, of June 22nd, 1855, (11 Stats. 611) as showing the boundaries between said nations.

I would further state that I am in receipt, by the hands of Hon. Van H. Manning, of a letter from Frank M. Morgan, a Cherokee Indian, dated March 31st, 1886, and a letter from E. C. Boudinot, also a Cherokee Indian, bearing same date, enclosing therewith a map purporting to show the boundaries between the Choctaw and Cherokee nations near Fort Smith, Arkansas, and a letter from the Adjutant General U.S.A., to Mr. Manning, dated the 23rd of same month, relative to the location of Fort Smith, Arkansas, and enclosing therewith a copy

of a tracing of the Fort, made by the Engineers' Department, from the deed of 1838. Mr. Morgan and Mr. Boudinot, request that this office will investigate and determine the location of the boundary lines between the Choctaw and Cherokee nations, near Fort Smith, Arkansas, to the extent necessary to ascertain to which of said nations a certain tract of land, containing about four acres, situated on the south side or bank of the Arkansas River, near Fort Smith, belongs. Mr. Morgan claims that, as a Cherokee Indian citizen, he has taken possession of said land—the location of which is designated by the map accompanying his letter,—as a portion of the Cherokee national domain, and that in violation of his rights, Campbell Leflore, a Choctaw Indian, claims that said land is included within the boundaries of the Choctaw nation. Mr. Morgan refers to the treaties with said nations, and to the patent issued to the Cherokees, on December 31st, 1838, as showing that said tract of land is included within the boundaries of the Cherokee nation.

I am also in receipt of a letter from Mr. Leflore, as "Special Delegate of the Choctaw Nations", dated the 9th ultimo, relative to the same matter, enclosing therewith a communication to him from Edmund McCurtain, Principal Chief of Choctaw Nations, dated March 22nd, 1888, authorizing him to present the matter of the claim of Mr. Morgan "to a part of the territory of the Choctaw nation, and an attempt to occupy the same in violation of the treaties between the United States and the Choctaws and Chickasaws", with a view to having the United States determine the question of boundary, to the point in controversy; a notice from Mr. Leflore, dated March 24th, 1886, to Mr. Morgan, protesting against Morgan's intrusion upon said tract of land; Mr. Morgan's acknowledgment of the receipt of the notice, and stating that he would occupy said land until removed by the proper authorities; a letter from G. W.

Harkins to Mr. Leflore, dated the 8th of March, 1886, stating that Chief Bushyhead of the Cherokee nation, had informed Mr. Harkins, in reply to his statement that a Cherokee had claimed Choctaw lands, and intended building a house on the land owned and occupied by Mr. Leflore; that several years since, this same party had written him while in this city, to examine the boundary line between the Choctaws and Cherokees, which he did, and that it appeared from the map in the Department, that the Cherokees had no claim "south of the middle of the river channel of the Arkansas, and that he further voluntarily said, the Choctaw authorities could remove him and his effects as an intruder. Mr. Leflore also enclosed with his letter, a map of a part of the Indian Territory, adjacent to Fort Smith, purporting to show the boundaries between the Cherokee and Choctaw nations in that vicinity, and the location of the land in dispute; also a certified copy of a tracing of a portion of the map of the re-survey of the boundary line between Arkansas and the Choctaw lands, executed by H. E. McKee, U.S. Surveyor, under his contract, bearing date March 12th, 1877. Mr. Leflore claims that the right of Mr. Morgan to enter upon the lands of the Choctaw nation, is based upon the assumption that the lands belonging to the Cherokee nation extend south of the Arkansas River, at Forth Smith, and states that the baseless character of such claim requires no discussion, and requests, in behalf of the Principal Chief of the Choctaw nation, that the United States Agent for the Choctaw nation, be directed to remove Mr. Morgan and his property, improvements, and effects, from said lands, as provided in Section 2147 of the Revised Statutes.

Relative to this, I have to say that the preamble to the treaty with the Cherokees, made July 8th, 1817, (7 Stats. 156) declares that the Cherokees under authority from the President of the United States, given January 9th, 1809, "did explore the country on the west side of

the Mississippi, and made choice of the country on the Arkansas and White rivers, and settled themselves down upon United States lands, to which no other tribe of Indians have any just claim, and have duly notified the President of the United States thereof."

The 5th Article of said treaty provides that–

> "The United States bind themselves in exchange for lands ceded in the first and second articles hereof, to give to that part of the Cherokee nation on the Arkansas, as much land on said river and White river, as they have, or may hereafter receive from the Cherokee nation east of the Mississippi, acre for acre, as the just proportion due that part of the nation on the Arkansas, agreeably to their numbers; which is to commence on the north side of the Arkansas river, at the mouth of Point Remove or Budwell's Old Place; thence by a straight line northwardly to strike Chataunga Mountain, or the hill first above Shield Ferry, on White River, running up between said rivers for complement, the banks of which rivers to be the lines; and to have the above line from the point of begining to the point on White River run and marked, which shall be done soon after the ratification of this treaty."

By Article 2 of the treaty with the Choctaws, made October 8th, 1820, (7 Stats. 210) the United States granted to the Choctaws, in consideration of the cession to the United States, of certain lands east of the Mississippi, described in Art. 1 of the treaty,

> "a tract of country west of the Mississippi River, situated between the Arkansas and Red rivers, and bounded as follows–Beginning on the Arkansas River, where the lower boundary line of the

> Cherokee strikes the same, thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red River; thence down Red River, three miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning."

The 3rd Article of the treaty provides that the boundaries of said lands shall be ascertained and marked by a commissioner or commissioners to be appointed by the United States.

By the 1st Article of the treaty with the Choctaws, made January 20th, 1825, (7 Stats. 234) the Choctaws ceded to the United States,

> "all that portion of the landed ceded to them by the 2nd Article of the treaty of Doak Stand, (October 18, 1820) lying east of a line beginning on the Arkansas, one hundred paces east of Fort Smith, and running thence due south, to the Red River; it being understood that this line shall constitute and remain the permanent boundary between the United States and the Choctaws."

Article 1 of the treaty of May 6th, 1828, with the Cherokees, (7 Stats. 311) provides that

> "the western boundary of Arkansas shall be, and the same is hereby defined, viz: a line shall be run, commencing on Red River, at the point where the eastern Choctaw line strikes said river, and run due north with said line to the River Arkansas, thence in a direct line to the southwest corner of Missouri."

By Article 2 of the threaty, the United States agreed to possess the Cherokees, and to guarantee it to them

forever, 7,000,000 acres of land to be bounded as follows, viz:–

> "Commencing at that point on Arkansas River, where the eastern Choctaw boundary line strikes said river, and running thence with the western line of Arkansas, as defined in the foregoing article, to the southwest corner of Missouri, and thence the waters of Neosho, generally called Grand River; thence due west to a point from which a due south course will strike the present northwest corner of Arkansas Territory; thence continuing due south, on and with the present western boundary line of the Territory, to the main branch of Arkansas River; thence down said river to its junction with the Canadian River, and thence up and between the said rivers Arkansas and Canadian, to a point at which a line running north and south from river to river, will give the aforesaid 7,000,000 of acres. In addition to the 7,000,000 of acres thus provided for, and bounded, the United States further guarantees to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above described limits, and as far west as the sovereignty of the United States, and their right of soil extend."

In the 3rd Article of the treaty, the United States agreed to have the lines of the above cession run without delay.

In the 7th Article of the treaty, the Cherokees surrender to the United States all the lands to which they were entitled in Arkansas, and which were secured to them by the treaty of 8th of January, 1817, and the convention of the 27th of February, 1819. By the 2nd

Article of the treaty of September 20th, 1830, with the Choctaws, (7 Stats. 333), the

> "United States under a grant specially to be made by the President of the U.S., shall cause to be conveyed to the Choctaw nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them, while they shall exist as a nation, and live on it, beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork, if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington City, in the year 1825."

By Article 1 of the treaty of February 14, 1833, with the Cherokees (7 Stats. 414), the United States agree to

> "possess the Cherokees and to guarantee it to them forever, and that guarantee is hereby pledged of 7,000,000 acres of land to be bounded as follows, viz:—Beginning at a point on the old western territorial line of Arkansas Territory, being twenty-five miles north from the point where the territorial line crosses the Arkansas River; thence running from said north point, south on the said territorial line, to the place where said territorial line crosses the Verdigris River; thence down said Verdigris River to the Arkansas River; thence down said Arkansas, to a point where a stone is placed opposite to the east or lower bank of Grand River, at its junction

with the Arkansas; thence running south forty-four degrees west, one mile; thence in a straight line to a point four miles northerly from the mouth of the north fork of the Canadian; thence along the said four miles line to the Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas, where the eastern Choctaw boundary strikes said river, and running thence with the western line of Arkansas Territory as now defined, to the southwest corner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand River; thence up said Grand River, as far as the south line of the Osage reservation, extended if necessary; thence up and between said south Osage line, extended west if necessary, and a line drawn due west from the point of beginning, to a certain distance west, at which a line running north and south from said Osage line, to said due west line, will make seven million of acres within the whole described boundaries."

The treaty also gives to the Cherokees a perpetual outlet west. By the 2nd Article of the treaty the Cherokees:

> "relinquish and quit claim to the United States all the right, interest and title which the Cherokees have or claim to have in and to all the land ceded or claimed to have been ceded to said Cherokee nation by said treaty of May 6th, 1828, and not embraced within the limits or boundaries fixed in this present supplementary treaty or Articles of convention and agreement."

On March 23rd, 1842, a patent was issued to the Choctaws in pursuance of the treaty of 1830, (as ratified

by the Senate of the United States on the 24th of February, 1831), for the following described lands, to wit:–

> "Beginning near Forth Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork, if in the limits of the United States, or to those limits; thence due south to Red River and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington City in the year 1825."

By the 3rd Article of the treaty with the Cherokees, made December 29th, 1835, (7 Stat. 478), it was agreed that the lands ceded to the Cherokees by the treaty of February 14th, 1833, including the outlet, and the lands ceded to them by the 2nd Article of the said treaty of December 29th, 1835, shall be included in one patent executed to the Cherokee nation of Indians, by the President of the United States, according to the provisions of the act of May 28, 1830.

On December 31, 1838, a patent was issued to the Cherokee nation in pursuance of the treaties of May 6, 1828, February 14, 1833, and December 29, 1835, for two tracts of land, the boundaries of which, so far as bearing upon the question at issue, are here quoted:

> "thence down the Canadian River, on its north bank to its junction with Arkansas River, thence down the main channel of Arkansas River to the western boundary of the state of Arkansas, at the northern extremity of the eastern boundary of the lands of the Choctaws, on the south bank of the Arkansas River four chains and fifty-four links east of Fort Smith; thence north seven

> degrees, twenty-five minutes west with the western boundary of the state of Arkansas, seventy-six miles, sixty-four chains and fifty links, to the southwest corner of the state of Missouri."

By the treaty with the Choctaws and Chickasaws, made January 17th, 1837, (11 Stat. 573), the Chickasaws were given a district in the Choctaw country.

By the treaty of June 22nd, 1855, with the Choctaws and Chickasaws, (11 Stat. 611), Article 1, the boundaries of the Choctaws and Chickasaw country and fixed as follows, to wit:–

> "Beginning at a point on the Arkansas River, one hundred paces east of old Fort Smith, where the western boundary line of the state of Arkansas crosses the said river, and running thence due south to Red River, thence up Red River to the point where the meridian of one hundred degrees West longitude crosses the same; thence north along said meridian to the main Canadian River; thence down said river to its junction with the Arkansas River, thence down said river to the place of beginning."

By the 19th Article of the treaty, the United States agree to cause the eastern and western boundary lines of said country, described in the 1st article, and the western boundary of the Chickasaw district as defined in Article 2 of the treaty, to be run and permanently marked.

By the 21st Article of the treaty with the Cherokees, made July 19th, 1866, (14th Stat. 799) it is provided, that

> "it being difficult to learn the precise boundary line between the Cherokee country and the states of Arkansas, Missouri and Kansas, it is agreed

that the United States shall, at its own expense, cause the same to be run as far west as the Arkansas, and marked by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council."

On December 24th, 1821, Henry D. Downs, Commissioner &c., made his report to the Secretary of War, of a survey which he had been directed to make of the Choctaw boundary line west of the Mississippi, enclosing the field-notes and map of same, (but the map cannot be found), Mr. Downs states that he made such survey,

"beginning at the mouth of Little River, running thence down Red River to a point three miles below the mouth of Little River, running thence north twenty-nine degrees and fifteen minutes east, one hundred and fifteen miles, ten chains, and fifty links, to a post on the south bank of the Arkansas River, where the lower boundary line of the Cherokees strikes the same; running thence with the course of the Arkansas River, to the mouth of the Canadian Fork."

The following is an extract from Mr. Downs' field-notes:

"Sunday, 23rd, at 115 miles, 10 chains and 50 links, the south bank of the Arkansas River, the corner post marked on the south side M. 115, 10 chs.; 50 links, on the west side C.N., on the east side U.S., distance from the Cherokee corner on the north bank of the river, one mile and thirty chains, Arkansas River 630 yards wide. October 4th started from a post on the south side of the Arkansas, opposite the lower boundary of the Cherokees to meander the Arkansas."

The difference in the statement of the surveyor as to the width of the Arkansas River, 630 yards, and the distance from the Cherokee corner on the north side of the river, one mile and 20 chains, can be accounted for from the fact that the course of the river at that particular point bears north, as appears from the plats, at an angle of about 45 degrees.

A second survey of the eastern Choctaw boundary was made in 1825, by Mr. Conway, under instructions from the War Department, and a plat and field-notes of the same was forwarded to said Department on January 1", 1826 (but the field-notes cannot be found). From the plat it appears that the northern terminus of said line is at a point on the south bank of the Arkansas River, or in the channel of the River.

In 1831-32, Isaac McCoy, under instructions from the War Department, surveyed the Cherokee line from the southwest corner of Missouri to Fort Smith, on the Arkansas River (John Donelson, asst. surveyor). The following is an extract from the field-notes of the survey–

> "Miles 76. Thence at 12.50 chains left the cane-brake and entered an open prairie bottom-rich soil, 50 chains to cane again; 80 chains to the north bank of Arkansas River–set a stake and made round it, from which L 64° 20′ W. a cottonwood, marked C. L. 76 M. S. 36° 00′ E. a cottonwood marked U.S. 76 M. At this point is fixed the southeast corner of the Cherokee lands, 77M. Thence along the channel of the river 64.50 chains to the south bank where the northern extremity of the eastern boundary of the Choctaw lands strikes the Arkansas River."

As the landmarks of the eastern Choctaw boundary were growing dim from age, the boundary was retraced

by order of the Commissioner of Indian Affairs in 1858. This work was accomplished by Deputy Suveyors, A. H. Jones and H. M. C. Brown, and was in accordance with a provision of the treaty with the Choctaws and Chickasaws of January 22", 1855 (11 Stats. 611). The surveyors beginning their work at the northern end of the line, soon reported that the old line run by the first surveyor, diverged westward from what they found to be a true south line, and they were thereupon directed by the Commissioner to confine their labor to retracing and marking the old line as run by Commissioner Downs, in 1825, which they did and submitted a report of the same, together with a plat and field-notes of the survey. Messrs. Brown and Jones state in their report and field-notes, that,

> "upon our arrival at Forth Smith, we found the army officers had carefully preserved full evidence of the eastern boundary of the Chickasaw and Choctaw country at intersection with the south bank of the Arkansas River; by establishing and planting a large post, satisfactory evidence exists of the most easterly angle of Old Fort Smith, which was fully identified by several of the old inhabitants of this country and which is about 100 paces due west of the line, showing a practical coincidence with the specifications contained in the 1st Article of the treaty dated June, 1855. We became fully satisfied, especially after running a trial line two miles south and discovering the old blaze marks, that this post as previously established by the army officers, was a true and correct point, and actually on the old original line as run by J. T. Conway in the month of November, 1825, under the supervision of Mr. Downs' Commissioner. Therefore commence at said post, and run south –January 21, 1858–variation of true meridian

found to be 10.50' East, 4 chains, 00 links, X rood course east 4 chs., 15 lks. Enter military enclosure, 10.80 to a point selected as a proper and durable position to erect and build a stone monument as an "Initial Point" agreeably to the 5th section of our general instructions. The reason that this distance has been selected, is to avoid in all future time the washing and wearing away of the south bank of the Arkansas River which in 32 years, or since Mr. Downs made the original survey, has washed at least 10 chains.

"The monument now erected is of solid masonry 6 ft. high, well laid in mortar, with each side facing the cardinal points and having the following graved characters, to-wit: The cubical block planted upon the top, has engraved on the north side "Initial Point", on the east side "Arkansas", on the west side "Choctaw", on the south side "1858".

In accordance with the provisions of the treaty with the Cherokees of July 19", 1866 (14 Stat. 799), the boundary lines between the Cherokee country and the state of Arkansas, Missouri and Kansas, were surveyed under instructions from the Commissioner of Indian Affairs in 1871, under a contract agreed upon by Hon. Commissioner James M. Ashley, on the part of the United States, and Hon. Commissioner John S. Adair, on the part of the Cherokee nation, and Daniel P. Mitchell, United States Deputy Surveyor. Commissioners Ashley and Adair, submitted a report of the above with a plat and field-notes of the survey, from which it *appears that the initial monument of the Choctaw boundary*, heretofore described, which was placed at a safe distance south of the Arkansas River, was erroneously taken as the southern terminal point of the Cherokee boundary.

In the year 1877, H. E. McKee was employed as surveyor by the Secretary of the Interior, under authority of the act of Congress, approved March 3", 1875, entitled "An act to establish the boundary line between the state of Arkansas and the Indian country" to retrace and mark the boundary line between the state of Arkansas and the Indian country, as originally surveyed and marked, and upon which the lines of the surveys of the public lands in Arkansas were closed, and found the same to run westward, from what he found the boundary line would be if run due south to Red River, from the point on the Arkansas River 100 paces east of old Fort Smith, where the western boundary line of the state of Arkansas crosses the said river. The stone monument erected by Brown and Jones in 1858, and known as the "initial point" is 26.15 chains south of a point *in the Arkansas River, supposed to be the corner common to the Choctaw and Cherokee lands.* This initial monument was the starting point of the retracement of the Choctaw boundary by Deputy McKee, north to the Arkansas River, and south to Red River, upon the completion of which a meridianal or true treaty line was extended to the north bank of Red River. This latter line was run but not permanently marked, its sole object being to determine the quantity of land embraced between it and the established boundary, in order that the Indians might be properly compensated for the area of land unintentionally added to the state of Arkansas by the original survey of 1825. Deputy McKee submitted his report of the survey with plat and field notes of the same. The following is an extract from the field notes of the survey of the eastern Choctaw boundary, to wit:–

"Thence north measure counting from Initial Point 8.27 chains to north side of old warehouse 125 links through it on line 10.80 chains to south bank of Arkansas River. This was the starting point for Brown and Jones' measure on

> the first mile, and makes that mile 84 chains in length. The post at this point having disappeared, I set a sandstone 36 x 12 x 4 in. 10.45 chains north of initial point, marked Choc. on the west side, and Ark. on east side. Thence 12.49 chains a point near edge of water, from which run a base line of E. 350 links to a point from which a flag on the line at point on sand-bar in the Arkansas River, being N. 14.38' W. Distance from west end of the base line to flag, 13.40 chains, 12.15 chains a point on sand-bar in river for north end of Choctaw boundary line."

The following is an extract from said field-notes, relative to the survey of the eastern Cherokee line, to wit: "south 8.15' East on a random line, variation 9.05' East. From temporary 76 mile corner 16.52 chains left bank of Arkansas River–Run base S. 32' W. 23 chs. flag on random line on sand-bar, bears south 40 West –Distance to flag 41.57 chains 58.09 chains. Distance to flag (in advance of temporary post) 57.83 chains to a point 00.60 chains north 81¾' E. of the temporary post which marks the north end of the Choctaw line."

The plats of the survey of both the Choctaw and Cherokee east boundary line, shows that *said lines meet* at the point designated on said sand-bar in the Arkansas River.

The Act of March 3, 1875, provided that the boundary line between the state of Arkansas and the Indian country, as originally surveyed and marked, and upon which the surveys of the public lands in the state of Arkansas were closed, should be the permanent boundary line between said state and the Indian country; and that said boundary line should be retraced and marked, and that any monuments set up in any former survey, indicating any line at variance with the survey provided for in such act, should be obliterated.

The following is an extract from the Instructions from the General Land Office to H. E. McKee, November 12, 1877.

> "The line to be retraced by you, however, is that established by the retracement of Brown and Jones in the year 1858; but your attention is called to the fact that the starting point of this survey is the monument marked on the diagram as "initial point" which is shown to be 26.15 chains south of the true northeast corner of the Choctaw lands, and which has been hereinbefore described as being in the bed of the Arkansas River."

On June 13, 1881, the Choctaw nation filed a petition against the United States in the Court of Claims, setting forth sundry claims against the United States, among which was one for the value of 136,204.02 acres of land, erroneously taken from the Choctaw nation by the variation between the eastern Choctaw boundary, as fixed by the various treaties and as run by Deputy McKee in 1877, and the boundary established by the United States under the erroneous survey of 1825, and on the 1st of March, 1886, the said court decided that the Choctaws were entitled to the value of said 136,204.02 acres as against the United States, and gave judgment accordingly, from which the U.S. appealed, and such appeal is now pending before the U.S. Supreme Court, the Court thereby recognizing the lines established by McKee, of both the survey of 1825, and the true treaty line.

"The treaties, surveys, and all contemporaneous correspondence show that the Arkansas River is the boundary between the Cherokee and Choctaw countries. The mere fact that the monument representing the initial point, was set 10.80 chains south of the Arkansas River, in order to avoid its washing away in the future, cuts no

figure in the matter. The survey shows how far south of the river the monument was placed, and the object had in view in placing it there, giving the distance of its location from the river, from whence the survey must have commenced, in order to determine that that point is 10.80 chains south of the river."

It is shown that the course of the river has gradually changed to the southward, and as the boundary of the Cherokee country, as fixed by the treaty, is the Arkansas River, there is no possible way by which the Cherokees can obtain any right to land south of that river. In fact the case is so plain and clear to my mind, that further comment seems unnecessary.

I herefore have the honor to recommend that authority be granted for the removal of the said Frank M. Morgan from the land in question.

The original papers are herewith enclosed, with request for their return with your decision in the premises.

Very respectfully,
Your obdt. servant,

I. D. C. ATKINS
Commissioner.

(Cooper)

APPENDIX G

March 16, 1835, President Jackson, addressing the Cherokees east of the Mississippi River, said:

"* * * A number of your brethren, who have been delegated by that portion of your people favorable to emigration, have repaired to this place in the hope of being able to make some arrangement which would be acceptable to the Government of the United States and which would meet your approbation.* * * The whole subject has been taken into consideration and an arrangement has been made, which ought to be, and I trust will be, entirely satisfactory to you. The Senate of the United States have given their opinion of the value of your possessions, and this value has been insured to you in the arrangement which has been prepared. * * *The stipulations contained in this instrument (treaty, March 14, 1835) are designed to * * * lay the foundation of such social and political establishments in your new country as will render you a happy and prosperous people.* * * The United States have assigned to you a fertile and extensive country, with a very fine climate adapted to your habits, and with all the other natural advantages which you ought to desire or expect.

"I shall, in a short time, appoint commissioners for the purpose of meeting the whole body of your people in council. They will explain to you more fully my views and the nature of the stipulations which are offered to you.

"These stipulations provide, first, for an addition to the country already assigned to you west of the

Mississippi, and *for the conveyance of the whole of it by patent in fee simple, and also for the security of the necessary political rights, and for preventing white persons from trespassing upon you.* * * * There are 13,000,000 acres conveyed to the Western Cherokees and yourselves by former treaties, and which are destined for your and their permanent residence, so that your whole country west of the Mississippi will contain not less than 13,800,000 acres."* * * (Emphasis supplied)

APPENDIX H

Hon. C. A. HARRIS,
Commissioner of Indian Affairs.

(Idem, p. 988-Talk of Special Agent Mason to Cherokee council, at Red Clay, East Tennessee, July 31, 1837.)

Brothers, the President hopes you will see the force of the reasons he has given why you can not remain here, and that you will go contentedly and quietly to your new country. The Government will faithfully fulfill all the stipulations and engagements which it has contracted with you, and its earnest desire is to see you, prosperous and happy, and permanently settled in the fine country provided for you, where you will never again be disturbed. Brothers, is there among good men a father who could see his children exposed to dreadful dangers and not make every effort to snatch them away at once and place them in safety? The President feels for you as a father for his children. He sees you here exposed to fatal influences which are working for your destruction, and he earnestly desires to place you beyond their reach; hence his anxiety to see you safe in the new and distant country he has set apart for you. Once there and these fatal influences cannot reach you. Here you are pent up within narrow limits, and with difficulty many of your people find even a scanty subsistence. There you have a wide country to yourselves, where the industrious cultivator of the soil will reap his crops in peace and security, and where the hunter will find game in abundance. *Here you are subjected to laws, in the making of which you have no voice; laws which are unsuited to your customs and abhorrent to your ideas of liberty. There, Cherokees, you will make laws for yourselves, and establish such government as in your estimation may be best suited to your condition. There, Cherokees, in your new country you will be far beyond the limits or jurisdiction of any State or Territory. The country will be yours, yours exclusively. No other people can make claim to it, and you will be protected by the vigilant power of the United States against the intrusion of the white man.* * *
(Emphasis supplied)

APPENDIX I

OKLAHOMA HISTORICAL SOCIETY

FOUNDED MAY 27, 1893
HISTORICAL BUILDING
OKLAHOMA CITY, OKLAHOMA 73105

That you may better understand the few documents among the Cherokee records having to do with the licenses to prospect for and engage in the mining and selling of Gravel and Sand in the Nation, I am enclosing typewritten copies of same.

I also checked Cherokee Vol. 336, Register of Mineral Licenses and find the following:

Issued to	Date	No of years	Mineral	Location
H. H. Trott	4/12/83	10 years	Gravel	Sequoyah Dist.
Narcissa Owen	1/11/87		Gravel	Illinois Dist.
Robert L. Owen	1/11/87		Gravel	Illinois Dist.
C. Koehler	6/18/89	10 years	Sand	Canadian Dist.
Connell Rogers	8/27/90	10 years	Stone & Gravel	Illinois Dist.
Wm. P. Ross, Jr. Rufus O. Ross Charles Smith	2/23/91	20 years	Gravel & Stone	Illinois Dist.
A. O. Cowan	7/28/93	20 years	Gravel	Cooweeskoo Dist.
Kate Rogers	7/10/93	20 years	Gravel	Illinois Dist.
W. P. Ross & Co.	6/26/93	20 years	Gravel	Illinois Dist.
Connell Rogers	9/29/93	20 years	Gravel	Illinois Dist.
R. M. Walker	5/29/93	20 years	Gravel	Illinois Dist.

The only time I find any mention of payment of royalty, was on June 30, 1893 Connell Rogers certified he sold 25 cubic yards of Gravel from his lease below Railroad bridge on Grand River in Ill. Dist. during quarter ending 7/30/93 and fiscal year ending 9/30/93 and that there was due the nation for the tax, $.50.

Sincerely,
Rella Looney
Archivist, Indian Archives

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Geary
H. MERLE WOODS
El Reno

FOUNDED MAY 27, 1893

HISTORICAL BUILDING
OKLAHOMA CITY, OKLAHOMA 73105

This is to certify that I, LaJeanne McIntyre, am the Chief Clerk of the Oklahoma Historical Society; that the above and foregoing is a true and correct copy of "Register of Mineral License" dated Apr. 12, 1884 to Mar. 9, 1891 as it appears in file entitled (or volume No. 336, p. 2, 10 & 44), of the Cherokee Nation, formerly in the custody and control of the Secretary of the Interior and the Superintendent for the Five Civilized Tribes Agency, at Muskogee, Oklahoma, and since transferred to and now in the custody and control of the Oklahoma Historical Society, at Oklahoma City, Oklahoma, by authority of the Act of Congress, of March 27, 1934 (Public No. 133) and that by said act of Congress I am the officer and person authorized to certify to the same.

/s/ LaJeanne McIntyre
Chief Clerk
Oklahoma Historical Society

Oklahoma City. Oklahoma

May 12, 1969

[SEAL]

No.	To Whom Issued	When Issued	No. of Years Issued For	Kind of Mineral	District	Name of Firm	Names of Sureties	Post Office
1	H. H. Trott [Ex. April 12, 1885	April 12, 1884	10 yrs.	Gravel	Sequoyah	H. H. Trott	F. G. Allen J. T. Cunningham F. H. Cass	Unita, I.T.
2	Henry Effert [Ex. April 14, 1886	April 12, 1884	10 yrs.	Stone Coal	Coowerskower	Henry Effert	W. L. Trott F. G. Allen	Unita, I.T.
3	Robt. D. Blackstone	May 23, 1884	10 yrs.	SandStone	Canadian	Robt. D. Blackstone	Stephen Carlisle & R. E. Blackstone	[Expired]
(4)	D. B. Comak [Ex. July 1, 1887	May 26, 1884	10 yrs.	Stone Coal	Coowerskower	D. B. Comak	E. Southerland R. M. Allen J. M. Thomson M. Frazer	Unita, I.T.
5	Albert McGhee [Ex. May 28, 1886	July 25, 1884	10 yrs.	Stone Coal	Coowerskower	Albert McGhee	W. H. Brown Henry Wilson John H. McGhee Henry Goddard	Chitopa, Kan. (License Returned Oct. 10, 1887,
6	Geo. W. Thornton	July 25, 1884	10 yrs.	Stone Coal	Coowerskower	Geo. W. Thornton	A. B. Lucky G. W. Lucky	Unita, I.T.
7	John H. McGhee	July 25, 1884	10 yrs.	Stone Coal	Coowerskower	John H. McGhee	Albert McGhee John Caldwell H. M. Wilson M. Harland	Chitopa, Kan.
8	Robt. Dobkins [Ex May 11, 1886]	July 26, 1884	10 yrs.	Stone Coal	Coowerskower	Robt. Dobkins	G. W. Walker James Thornbaugh R. H. Fields	Unita, I.T.
9	J. C. Barker [Ex. Aug. 4, 1885]	Aug. 14, 1884	10 yrs.	Stone Coal	Coowerskower	J. C. Barker	Henry Fallen R. H. Fields W. H. Brown A. A. Kelley	Chitopa, Kans.

No.	To Whom Issued:	When Issued	No. of Years Issued For	Kind of Mineral	District	Name of Firm	Names of Sureties	Post Office
39	Wm. McCracken	Nov. 3, 1886	10 yrs.	Stone Coal	Coowerkoower	Wm. McCracken	D. W. Lipe Wm. Howell Albert Morris	Choctaw, I.T.
40	D. W. Lipe	Nov. 13, 1886	10 yrs.	Stone Coal	Coowerkoower	D. W. Lipe	Wm. Howell Albert Morris Conell Rogers	
41	Laura Schrimsher [Ex Apr. 1, 1887]	Dec. 4,	5 yrs.	Stone Coal	Coowerkoower	Laura Schrimsher	A. H. Kelly G. W. Green	Unita, I.T.
42	Wm. Howell [Ex Dec. 17, 1887]	Dec. 17, 1886	5 yrs.	Stone Coal	Delaware	Wm. Howell	D. W. Lipe Conell Rogers Albert Morris	Prairie City, I.T.
43	Robert & Narcissa Owen	July 11, 1887		Gravel	Illinois	Narcissa Owen	Robert L. Owen	Muskogee, I.T.
44	Robt. L. Owen	July 11, 1887		Gravel	Illinois	Robt. L. Owen	J. S. Stapler	Muskogee, I.T.
45	H. H. Loflin	Jan. 12, 1887		Stone Coal	Coowerkoower	H. H. Loflin	B. W. Alberty A. H. Bach M. W. Dial N. H. Dial W. G. Ward	"
46	Geo. Bullatte	Jan. 26, 1887	10 yrs.	Stone Coal	Coowerkoower	Geo Bullatte	Kale Starr R. F. Wyly R. M. French	Claremore, I.T.
47	Wm. McCracken Van Chambers [In force 1888]	Mar. 1, 1887	10 yrs.	Stone	Coowerkoower	Chambers & McCracken	J. Thompson	Claremore, I.T.
48	Thos. B. French [Ex Mar. 8, 1888]	Mar. 8, 1887	10 yrs.	Stone Coal	Illinois	P. B. French	E. C. Boudinot T. F. French	Ft. Gibson, I.T.

No.	To Whom Issued	When Issued	No. of Years Issued For	Kind of Mineral	District	Name of Firm	Names of Sureties	Post Office
60	J. A. Scales O. P. Brewer	Feb. 13, 1891	20 Years	Lead and Copper	Illinois	Brewer & Scales	James C. Buchanan R. E. Blackstone	Webbers Falls Ind. Ter.
61	Wm. P. Ross, Jr. Rufus O. Ross Charles Smith	Feb. 23, 1891	20 Years	Gravel, Stone	Illinois	Ross, Smith and Ross	S. D. Clark W. T. Harmage W. W. Ross J. W. M. Spaddin Joe Heinich J. W. Ross R. D. Trainor W. W. Ross, Jr. Joe Ross	
62	Cora A. Shackelford	March 9, 1891	20 Years	Lead and Zinc	Delaware	Cora A. Shackelford	Clarence W. Fraser P. N. Blackstone	Muscogee, I.T.
63	Narcissa Owen	March 9, 1891	20 Years	Lead and Zinc	Delaware	Narcissa Owen	Clarence W. Turner P. N. Blackstone	Muscogee, I.T.
64	W. R. Shackelford	March 9, 1891	20 Years	Lead and Zinc	Delaware	W. R. Shackelford	Clarence W. Turner P. N. Blackstone	Muscogee, I.T.
65	Wm. O. Owen, Jr.	March 9, 1891	20 Years	Lead and Zinc	Delaware	Wm. O. Owen, Jr.	Clarence W. Turner P. N. Blackstone	Muscogee, I.T.